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# LESBIAN AND GAY FAMILIES AND THE LAW: A PROGRESS REPORT

*Arthur S. Leonard\**

## I. Introduction

The movement for lesbian and gay rights proceeds in stages. In the first stage, which I call "Legalization," there is the struggle to decriminalize homosexual status by obtaining the repeal or judicial invalidation of laws that penalize sexual contact between same-sex partners;<sup>1</sup> such laws, while not technically creating a status offense of homosexual orientation, impart the aura of criminality to lesbian and gay people.<sup>2</sup> In the second stage, which I call "Nondiscrimina-

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\* Professor, New York Law School. Thanks to Todd V. Lamb, New York Law School Class of 1994, for helpful research assistance. This article is an expanded version of a talk given to the Cornell University Gay and Lesbian Alumni Association at the Cornell Club, New York City, January 19, 1994.

1. The first stage has its roots in the mid-19th century, when isolated law reformers in Central Europe proposed that homosexuality be recognized as a morally neutral phenomenon and that harsh criminal penalties for same-sex behavior be removed. In the United States, the drive toward "Legalization" began in the 1950's with successful efforts to persuade the American Law Institute to recommend removal of penalties for private, consensual adult sex in the Model Penal Code. Beginning in the 1960's and accelerating through the 1970's, private consensual adult sex (including same-sex activity) has been decriminalized in more than half the states, usually through legislative reform, sometimes through judicial invalidation. For an excellent summary of this history, see WARREN JOHANSSON & WILLIAM A. PERCY, *OUTING: SHATTERING THE CONSPIRACY OF SILENCE* (1994). This trend received a temporary setback in 1986 in *Bowers v. Hardwick*, 478 U.S. 186, in which the Supreme Court held by 5-4 vote that Georgia's felony sodomy law did not violate the right of privacy found in the 14th Amendment's Due Process Clause. The first stage continues, however, as two jurisdictions achieved legislative reform in 1993 (Nevada and the District of Columbia), and state appellate courts in Kentucky and Texas have recently invalidated sodomy laws using state constitutional theories. *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *City of Dallas v. England*, 846 S.W.2d 957 (Tex. Ct. App. 1993). However, during 1994 the highest courts of Louisiana and Mississippi rejected state constitutional challenges to sodomy laws, although their decisions were premised on lack of personal standing by the criminal defendants, who were accused of public behavior, rather than on an ultimate rejection of the argument that the laws might be unconstitutional as applied to private, consensual sex between adults. *Miller v. State*, 636 So.2d 391 (Miss. 1994); *State v. Baxley*, 633 So.2d 142 (La. 1994).

2. For example, in *City of Dallas v. England*, 846 S.W.2d 957, a lesbian applicant for a position as a police officer was denied the job on the basis of the Texas sodomy law. Police officials asserted that a law enforcement agency should not be required to hire someone who is a presumptive criminal. The court found the sodomy law unconstitutional, and held that the police department could not rely on it for this purpose. However, the United States Court of Appeals for the District of Columbia Circuit approved a similar rationale for dismissing a suit by a lesbian denied a position as an

tion," lesbians and gay men have sought protection against affirmative discrimination that society accords to members of recognized "minority groups." In this stage, the main vehicles are so-called "gay rights" laws,<sup>3</sup> or litigation challenging discriminatory governmental policies using constitutional theories.<sup>4</sup> In the third stage, which I call "Normalization," the movement fully engages the problem of heterosexism. Heterosexism is a state of mind in which heterosexuality, and the way heterosexuality leads to the structures and institutions of people's lives, is assumed not only to be the norm, but the only acceptable basis for social policy.<sup>5</sup> One of the central goals of the third stage is societal acceptance and support for the reality of lesbian and gay family structures as something to be valued and reinforced, in the same way that society values and reinforces heterosexually-based family structures.<sup>6</sup>

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agent of the Federal Bureau of Investigation in *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987). In *Constant A. v. Paul C.A.*, 496 A.2d 1 (Pa. Super. Ct. 1985), a Pennsylvania court deprived a lesbian mother of custody, asserting that her children might be endangered if she were to travel through a state that penalized sodomy and were to be arrested for committing the offense. The Virginia sodomy law was cited in *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985), as a public policy justification for denying child custody to a gay man. The decision was illustrative of custody or visitation decisions in jurisdictions with sodomy laws. *E.g.*, *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. Ct. App. 1987) (denying custody petition of lesbian mother).

3. For a review of the current status of laws forbidding sexual orientation discrimination, see Arthur S. Leonard, *Sexual Orientation and the Workplace: A Rapidly Developing Field*, 44 LAB. L.J. 574 (Sept. 1993); Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905 (1993).

4. For example, numerous lawsuits have been filed challenging the Defense Department's policy of excluding lesbians and gay men from military service. The most significant pending suits are *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993) (Defense Department policy violates Equal Protection), *motion for rehearing granted*; *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 655 (1992) (Defense Department policy may violate Equal Protection if Department cannot show a non-discriminatory justification for it), trial pending; and *Meinhold v. United States*, — F.3d —, 1994 WL 467311 (9th Cir., Aug. 31, 1994) (Department of Defense policy should be construed so as to avoid discharge of gay sailor as to whom there was no affirmative evidence of actual or desired homosexual conduct).

5. See Arthur S. Leonard, *From Law: Homophobia, Heterosexism and Judicial Decision Making*, 1 J. GAY & LESBIAN PSYCHOTHERAPY, No. 4, 65 (1991).

6. This ordering of stages in the struggle for lesbian and gay rights is a generalization that does not necessarily hold true in all jurisdictions. While decriminalization may precede the passage of civil rights laws, and achievement of civil rights laws may precede normalization, peculiarities of local politics may vary the order. For example, New York courts have accorded limited recognition to lesbian and gay families in the absence of a state law forbidding sexual orientation discrimination. See, *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49 (N.Y. 1989); *Gay Teachers Ass'n v. Board of Educ.*, 585 N.Y.S.2d 1016 (App. Div. 1992), even while a sodomy law is on the books in New York, although the sodomy law was declared unenforceable against private,

The first stage of the struggle is well-advanced in the United States. Over the past thirty-five years, decriminalization has been achieved in more than half of the states, constituting the overwhelming majority of the country's residents.<sup>7</sup> The second stage has made less headway: state laws banning sexual orientation discrimination have been enacted in fewer than one-fifth of the states, although governmental policies and local legislation, viewed in combination with the state laws, provide some form of protection against discrimination on the basis of sexual orientation for a substantial portion of the population.<sup>8</sup>

The third stage is at even an earlier point of development. No state allows same-sex couples to marry and obtain the immediate benefits attached to full legal recognition of familial status,<sup>9</sup> and the public remains overwhelmingly opposed to same-sex marriage.<sup>10</sup> Nevertheless, as this article will show, significant advances have been made toward the acknowledgement of lesbian and gay families as social structures worthy of social recognition and sup-

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consensual adult sex in 1980, *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), *cert. denied sub nom. New York v. Onofre*, 451 U.S. 987 (1981).

7. Arthur S. Leonard, *Sexual Orientation Discrimination: A Growing Issue in State and Local Law*, in *CONTEMPORARY ISSUES IN LABOR AND EMPLOYMENT LAW* 193 (Bruno Stein, ed., 1993).

8. *Id.*

9. In *Van Dyck v. Van Dyck*, 425 S.E.2d 853 (Ga. 1993), concurring Justice Sears-Collins, agreeing that Georgia's live-in-lover statute, GA. CODE ANN. § 19-6-19(b) (1991 & Supp. 1994), should not be construed to deprive a former wife of alimony on the ground that she was now living with a lesbian partner, catalogued the rights of marital partners that are not accorded to same-sex couples because of their exclusion from the right to marry, as follows:

These rights include the right to: a) file joint income tax returns; b) create a marital life estate trust; c) claim estate tax marital deductions; d) claim family partnership tax income; e) recover damages based on injury to a partner; f) receive survivor's benefits; g) enter hospitals, jails and other places restricted to "immediate family"; h) live in neighborhoods zoned "family only"; i) obtain "family" health insurance, dental insurance, bereavement leave and other employment benefits; j) collect unemployment benefits if they quit their job to move with their partner to a new location because he or she has obtained a new job; k) get residency status for a noncitizen partner to avoid deportation; l) automatically make medical decisions in the event a partner is injured or incapacitated; m) and automatically inherit a partner's property in the event he or she dies without a will. Many of the other legal consequences of gay "coupling" are not so immediately apparent, but surface only at times of stress — misunderstandings, separation and death. 425 S.E.2d at 855 (footnote omitted).

10. See *Poll: Majority Against Gay Marriages*, CHI. TRIBUNE, Feb. 7, 1994, at 8 (reporting a Newsweek poll showing that 62% of those polled opposed legally sanctioned gay marriages, although 74% favored protecting gays from job bias and 81% favored protecting gays from housing discrimination).

port in a variety of contexts, and serious challenges to the marriage citadel are ongoing.

The common link between cases in which courts or legislative bodies have recognized lesbian and gay families is the willingness to accept as a given the actual living arrangements of a particular couple (with or without children) that is functioning effectively as a family unit, represented by emotional and financial entanglement, and further, to reinterpret or bend existing rules to accommodate that reality. These courts have accepted the proposition, advanced by New York State Appellate Division Justice Sidney H. Asch, that "the best description of a family is a continuing relationship of love and care, and an assumption of responsibility for some other person."<sup>11</sup>

## II. Lesbian and Gay Marriage

The Normalization stage of the struggle for lesbian and gay rights focuses on the problem of heterosexism, and the exclusion of lesbian and gay couples from marriage is a prime example of heterosexism at work. Heterosexism is a form of "prejudice and antipathy," as it is founded on a mentality that, shunning deviation from the familiar or statistically "normal," underlies prejudice on the basis of race, the same mentality that equates "difference" with "inferiority." Lesbians and gay men should be able to count on the courts to require governmental bodies to produce substantial, objective and non-discriminatory justifications for policies that exclude them from participation in the basic institutions of our society, such as the institution of marriage.

In the early flowering of lesbian and gay rights litigation in the 1970s, some gay people optimistically filed lawsuits seeking to compel public authorities to let them marry their same-sex partners. Decisions in these cases were issued by appellate courts in the states of Kentucky,<sup>12</sup> Minnesota<sup>13</sup> and Washington.<sup>14</sup> In all of them, the courts refused to order the government to award marriage licenses to same-sex couples. The arguments advanced by the gay litigants were generally two-fold: 1) where marriage laws did not specify in so many words that only opposite-sex couples could

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11. *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 201 (App. Div., 1982) (approving same-sex adult adoption petition).

12. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973).

13. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

14. *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

marry, gay litigants asked the courts to interpret the laws to allow same-sex couples to marry; and 2) where the first argument failed or was not available, the plaintiffs argued that there was a constitutional right to same-sex marriage.

### A. Statutory Arguments

The first argument, that same sex marriages should be recognized where not explicitly excluded, was not successful anywhere because of the doctrines of legislative intent and plain meaning. When a statute is capable of being given a variety of meanings based on vague or general language, courts attempt to determine the meaning most likely intended by the legislature, and for this purpose will give words their "ordinary" or "everyday" meanings.<sup>15</sup>

In the Minnesota case, for example, Justice C. Donald Peterson rejected the argument that the state's apparently gender-neutral marriage law could be interpreted to allow same-sex marriage.<sup>16</sup> The judge commented "[it] is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term in any different sense," and cited contemporary dictionaries to support the court's determination that marriage could only exist between a man and a woman.<sup>17</sup>

To the extent that one might find legislative history (committee reports, legislative debates) to elucidate legislative intent, it is unlikely that one could find any statements by legislators that they intended to authorize same-sex marriages when they revised antiquated domestic relations laws by introducing gender neutral language. If such statements had existed, the plaintiffs certainly would have quoted them, but none of the appellate decisions from the 1970s indicate that any such evidence was presented. Whether on the basis of legislative intent or plain meaning, the recognition of same-sex marriage is difficult to obtain through interpretation of existing laws.

### B. Constitutional Arguments

The gay litigants of the 1970s were no more successful in arguing for a constitutional right. They tried a variety of theories, but the main lines of argument were that denial of same-sex marriage violated the Due Process Clause of the Fourteenth Amendment, by

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15. See, e.g., *A.J. Arave v. Creech*, 113 S.Ct. 1534 (1993); *INS v. Phinpahyha*, 464 U.S. 183, 189 (1984); *Richards v. U.S.*, 369 U.S. 1, 9 (1962).

16. *Baker*, 191 N.W.2d at 185, 186.

17. *Id.*

depriving same-sex couples of the fundamental right to marry, or the Equal Protection Clause of the Fourteenth Amendment, by discriminating against same-sex couples on the basis of gender or sexual orientation.

The courts will normally uphold laws against Fourteenth Amendment challenges if they find that there is a rational justification for the laws, not based solely on prejudice against a particular group. However, if the challenged laws affect a "fundamental right," or discriminate on the basis of a classification that the courts consider "suspect," the courts will require much more justification for the law: the government's burden is to show that the law was enacted to achieve a compelling state interest, and that it was carefully drafted to achieve that interest without unduly interfering with constitutional rights.<sup>18</sup>

### 1. Fundamental Right

In the context of marriage, a strong argument could be made that a fundamental right is involved. In 1942, the Supreme Court struck down an Oklahoma law that authorized sterilization of persons with multiple convictions of crimes of "moral turpitude,"<sup>19</sup> stating that the legislation involved "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."<sup>20</sup> In *Loving v. Virginia*,<sup>21</sup> a 1967 decision invalidating a law that banned interracial marriages, the Court reiterated that the right to marry "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Similarly, in a later case, the Court held that prison authorities could not forbid a prisoner from marrying.<sup>22</sup>

However, when gay litigants later tried to rely on *Loving v. Virginia* for their fundamental right theory, they ran up against two barriers: the fact that *Loving* did not involve same-sex marriage, for which there was not a long tradition of societal recognition underlying the determination that the right to marry was fundamental, and the tautological argument that the union of a same-sex couple could not be a "marriage" because "marriage" was defined as the union of an opposite-sex couple. As the Kentucky Court of

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18. LAURENCE C. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-1 - 16-7, at 1436-1454 (2d ed. 1988).

19. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

20. *Id.* at 541.

21. 388 U.S. 1, 12 (1967).

22. *Turner v. Safley*, 482 U.S. 78 (1987).

Appeals stated in 1973, a marriage license could not be granted to a same-sex couple "because what they propose is not a marriage."<sup>23</sup> The courts found these arguments convincing.

## 2. *Suspect Classification*

Turning to the "suspect classification" branch of the Equal Protection argument, the plaintiffs were no more successful because the courts refused to acknowledge that the marriage laws discriminated on the basis of sexual orientation. Implicitly making a point that the Hawaii Supreme Court would later articulate in 1993, the appellate courts of the 1970s found that the sexual orientation of the plaintiffs was irrelevant; whether they were homosexual, heterosexual or bisexual, the state would not allow same-sex couples to marry.<sup>24</sup> The Washington Court of Appeals, disclaiming taking any position on the question whether "homosexuals constitute a class having characteristics making any legislative classification applicable to them one having common denominators of suspectability,"<sup>25</sup> asserted that the state had a rational basis for limiting access to marriage to opposite-sex couples:

[M]arriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman.<sup>26</sup>

The Supreme Court has never declared homosexuality or sexual orientation to be a suspect classification. In the absence of a Supreme Court ruling, a lower court must determine whether particular legislative discrimination is based on a suspect classification by examining those factors that the Supreme Court has identified as significant in making such a determination. Race is the quintessential suspect class; the legislative history of the Fourteenth Amendment shows that in adopting this amendment the nation was attempting to require the states to refrain from discriminating against African Americans, recently liberated from slavery during the Civil War. If a classification or characteristic is relevantly simi-

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23. *Jones v. Hallahan*, 501 S.W.2d 588, 590 (1973).

24. The decisions of the 1970s are summarized in ARTHUR S. LEONARD, *SEXUALITY AND THE LAW: AN ENCYCLOPEDIA OF MAJOR LEGAL CASES* 288-292 (1993) [hereinafter *SEXUALITY AND THE LAW*].

25. *Singer v. Hara*, 522 P.2d 1187, 1196, n. 12 (Wash. Ct. App., 1974).

26. *Id.* at 1197.



lar to race, then it is likely to be found "suspect" for purposes of the Equal Protection Clause.<sup>27</sup>

In *City of Cleburne v. Cleburne Living Center*, the Supreme Court described how it determines whether a classification is suspect.<sup>28</sup> The Court said that race, alienage and national origin are suspect because

[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest . . .<sup>29</sup>

The Court explained that legislative classifications based on gender call for "a heightened standard of review" because "[t]hat factor generally provides no sensible ground for differential treatment"; therefore a "gender classification fails unless it is substantially related to a sufficiently important governmental interest."<sup>30</sup> Classifications based on "illegitimacy" of birth are also subject to "somewhat heightened scrutiny" because "illegitimacy is beyond the individual's control and bears 'no relation to the individual's ability to participate in and contribute to society.'"<sup>31</sup>

However, the Court explained, there is no "heightened review" of classifications based on age, because "the aged . . . have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."<sup>32</sup> In the dispute before the Court in *Cleburne* over a special zoning law enacted to deter licensing of a group home for the mentally retarded, the Court concluded that the law was not subject to heightened scrutiny. However, the Court concluded that the law was motivated entirely by fear of the mentally retarded, and thus failed the normally deferential rationality test.<sup>33</sup>

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27. See, e.g., *Shaw v. Reno*, 113 S.Ct. 2816, 2824 (1993); *Hunter v. Erickson*, 393 U.S. 385 (1969).

28. 473 U.S. 432 (1985).

29. *Id.* at 440.

30. *Id.* at 440-41.

31. *Id.* at 441.

32. *Id.*

33. *Cleburne*, 473 U.S. at 448.

Is sexual orientation a suspect classification under this formulation? In the 1970s marriage cases, the courts abstained from answering the question by insisting that the laws did not discriminate on that basis.<sup>34</sup> In the context of continuing litigation over anti-gay discrimination since that time, this has become one of the most bitterly argued points in lesbian and gay law.

For many lesbians and gay men, homosexuality is similar to race in ways relevant to determining whether a classification is suspect. It is a personal characteristic that gay people discover about themselves, rather than a conscious choice. Gay people tend to feel that their sexuality is a basic part of who they are, not just a passing whim or preference, and claims that sexual orientation can be changed are not based on controlled, scientific study, but rather anecdotal evidence of dubious provenance. Like race, homosexuality has long been the basis for discriminatory treatment, even though most gay people would likely contend that their sexual orientation is irrelevant to their qualifications or ability to participate in the activities from which they are being excluded. And, like African-Americans at the time the Fourteenth Amendment was passed, gays have traditionally been at a severe disadvantage in securing legislative policies favorable to them, due to intense social prejudice fueled by entrenched religious teachings.<sup>35</sup>

Given all these factors, gay litigants have argued that discriminatory governmental policies should be given heightened scrutiny. Most courts disagree, partly because judges have rejected the attempted analogy between homosexuality and race as fundamental characteristics of personal identity. These judges embrace the view of homosexuality that predates the mid-19th century identification of the concept of sexual orientation; they view homosexuality as a "behavior" in which any person might decide to engage or not to engage, a "choice," and thus not deserving of special protection.<sup>36</sup>

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34. See *supra* note 24.

35. The halting progress in the Nondiscrimination phase of the lesbian and gay rights movement illustrates this point, a point emphasized by the recent success of the anti-gay voter initiative movement.

36. For example, in *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, *reh'g en banc denied*, 909 F.2d 375 (9th Cir. 1991), Judge Brunetti wrote that "homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes." 895 F.2d at 573. Similarly, in *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), rejecting a suspect classification claim, Judge Archer wrote that "homosexuality is primarily behavioral in nature." 871 F.2d at 1076. Reaching the same conclusion from another direction, Judge Wood of the Seventh Circuit accepted the

The same view of homosexuality seems implicit in the Supreme Court's 1986 *Bowers v. Hardwick* decision, and is criticized in Justice Harry Blackmun's dissent in that case, which emphasizes that the constitutional privacy doctrine protects such "choices" as decisions about whom one selects as a sexual partner.<sup>37</sup> Because the Supreme Court held in *Hardwick* that the government could forbid individuals from making the choice to engage in homosexual conduct, an identity predicated on the desire to engage in such conduct could not possibly be the basis for a suspect classification, under this line of reasoning.<sup>38</sup>

Additionally, some courts have pointed to the modest successes of the second stage of the struggle for lesbian and gay rights and proclaimed that gays do not lack political power and thus do not need special protection by the courts under the Equal Protection Clause.<sup>39</sup> Under this reasoning, however, race should disappear as a suspect classification for several reasons. First, federal, state and local legislation outlawing race discrimination has become ubiquitous. Second, the African-American caucus in Congress greatly outnumbers the two openly gay men from liberal Massachusetts who serve in the House of Representatives.<sup>40</sup> Finally, many of the largest cities in the United States have elected black mayors over the past two decades.

Adequate consideration of whether laws that discriminate against lesbians and gay men merit heightened scrutiny would harken to Justice Byron White's explanation in *Cleburne* of why race, alienage and national origin classifications are suspect: these are "factors which are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considera-

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Defense Department's conceptualization of homosexuality, agreeing that a declaration by an individual that she is a lesbian can rationally and reasonably be viewed as reliable evidence of a desire and "propensity to engage in homosexual conduct." *BenShalom v. Marsh*, 881 F.2d 454, 458 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990). Thus, homosexuality as an orientation or status does not exist apart from the desire or "propensity" to engage in homosexual conduct, according to these judges.

37. *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986).

38. This analysis of the Equal Protection issue was first explicitly adopted in *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987), by Judge Silberman, who stated that "[it] would be anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause." *Id.* at 103.

39. The Seventh Circuit in *BenShalom*, 881 F.2d 464, for example, found that gays did not lack political power because, *inter alia*, the mayor of Chicago had recently participated in a "gay rights parade" in that city. *Id.* at 465, n. 9.

40. It is significant that neither of the representatives was openly gay when first elected.

tions are deemed to reflect prejudice and antipathy."<sup>41</sup> This seems like an accurate description of the factor of sexual orientation, when viewed apart from the issue of regulating sexual behavior.

### C. State Constitutional Arguments

Apart from the Fourteenth Amendment arguments, one of the 1970s courts also faced a significant state law argument. In *Singer v. Hara*, the plaintiff pointed to the state constitution's Equal Rights Amendment (ERA), forbidding sex discrimination, that Washington State voters had recently adopted, and argued that denying a marriage license to a same-sex couple was sex discrimination, just as denying a marriage license to a mixed-race couple had been found by the Supreme Court to be race discrimination in *Loving v. Virginia*.<sup>42</sup>

The argument did not impress the Washington court, which explained that under the ERA "laws which differentiate between the sexes are permissible so long as they are based upon the unique physical characteristics of a particular sex, rather than upon a person's membership in a particular sex *per se*."<sup>43</sup> Judge Swanson wrote for the court that the state's rationale for limiting marriage to opposite-sex couples was "based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children."<sup>44</sup> Since "no same-sex couple offers the possibility of birth of children by their union," the state's definition of marriage as a union of a man and a woman was based on "the physical characteristics of the sexes," and not on unlawful discrimination offensive to the ERA.<sup>45</sup>

### D. Recent Litigation

All of the legal challenges seeking same-sex marriage during the 1970s failed, and lesbian and gay legal groups did not pursue the issue further at that time. The issue burst into prominence again during the late 1980s, probably as a result of several converging phenomena: increasing numbers of lesbians and gay men were raising children together as couples; the AIDS epidemic was demonstrating to many people that the lack of legally recognized family

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41. *BenShalom*, 881 F.2d at 463, quoting *Cleburne*, 473 U.S. at 440.

42. *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

43. *Id.* at 1194.

44. *Id.* at 1195.

45. *Id.*

structures was harmful in the context of illness and death;<sup>46</sup> and the claims of Normalization were pressing more strongly as progress in obtaining civil rights protection encouraged more lesbians and gay men to live together openly. For instance, a new push for same-sex marriage got a big boost from the 1987 March on Washington for lesbian and gay rights, when a giant mock marriage ceremony was staged on the steps of the Internal Revenue Service headquarters.<sup>47</sup> Although gay movement legal organizations had come to a general agreement to avoid instigating same-sex marriage litigation, individuals across the country were determined to push the issue forward. Test cases were filed in the District of Columbia and the state of Hawaii. Both were unsuccessful at the trial level.

### 1. *The Washington D.C. Case*

In Washington, D.C., the two gay male litigants, Craig Dean and Patrick Gill, avoided the federal constitutional arguments that had proven unpersuasive in the 1970s marriage cases. Instead, their case was based primarily on two arguments: that the gender-neutral District marriage law should be construed to allow same-sex marriages, and that a District ordinance banning sexual orientation discrimination in public services applied to the city's marriage license bureau.<sup>48</sup> At trial, this turned into arguments over whether an ordinance that uses the term "marriage" could possibly be construed to extend to same-sex relationships, and whether the city council had intended its ordinance to apply to the marriage bureau.

The plaintiffs submitted extensive documentation, including some ancient historical sources,<sup>49</sup> to show that the concept of mar-

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46. Among the contexts in which the lack of legal family recognition became significant in the AIDS epidemic were: lack of inclusion of people with AIDS in their same-sex partners' employment-based health insurance coverage; disputes with landlords over whether the same-sex survivors of persons with AIDS could succeed to the tenancy of their deceased partners' apartments; battles over inheritance rights when people with AIDS died without making wills, or even when they made wills, traditional family members would challenge the wills on the basis of undue influence or incapacity; problems with hospitals that would not recognize the same-sex partner as a family member for purposes of access and involvement in treatment information and decision-making.

47. Linda Wheeler, *2,000 Gay Couples Exchange Vows in Ceremony of Rights*, WASH. POST, Oct. 11, 1987, at B1.

48. *Dean & Gill v. District of Columbia*, 18 Fam. L. Rep. (BNA) 1141 (D.C. Super. Ct. 1991), *denying motion for reconsideration*, 18 Fam. L. Rep. (BNA) 1387 (D.C. Superior Ct., 1992), *appeal pending*.

49. See JOHN BOSWELL, *SAME-SEX UNIONS IN PRE-MODERN EUROPE* (1994). Professor Boswell submitted an affidavit in *Dean & Gill* summarizing his research.

riage had been applied to same-sex couples.<sup>50</sup> Additionally, the plaintiffs presented circumstantial evidence that the city council did not contemplate excepting any city agencies from the requirement of non-discrimination. Nevertheless, Superior Court Judge Shellie Bowers ruled against them and ordered the case dismissed. In support of his decision, the judge cited Biblical passages for the proposition that the institution of marriage had from earliest times been conceived as a union of man and woman, and dismissed the argument that the District Council intended to apply its non-discrimination ordinance to the marriage license bureau.<sup>51</sup> An appeal was argued to the District of Columbia Court of Appeals on November 1, 1993.<sup>52</sup>

## 2. *The Hawaii Case*

The Hawaii case was a test case brought by a group of same-sex couples. Without a trial and in an unpublished opinion, Circuit Court Judge Robert Klein granted the state's motion to dismiss.<sup>53</sup> Judge Klein found that excluding same-sex couples from marrying did not violate their right of privacy under the Hawaii constitution, which he found accorded no greater rights on this score than the federal constitution. He also found no equal protection violation because homosexuality was not, in his opinion, a suspect classification for purposes of Hawaii constitutional law. Finally, he concluded that the marriage law "is obviously designed to promote the general welfare interests of the community by sanctioning traditional man-woman family units and procreation."<sup>54</sup>

On appeal, the plaintiffs achieved an historic breakthrough by persuading the Hawaii Supreme Court that the ban on same-sex marriage required heightened judicial scrutiny.<sup>55</sup> Ironically, however, the Hawaii court agreed with the 1970s courts that had concluded that the ban on same-sex marriage did not discriminate on the basis of sexual orientation, since same-sex marriage was prohibited regardless of the sexual orientation of the participants.<sup>56</sup>

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50. *Dean & Gill*, 18 Fam. L. Rep. (BNA) at 1142.

51. *Id.*

52. Elizabeth Schwinn, *Court Ruling Could Open Door to Gay Marriages in Capital*, HOUS. CHRONICLE, Nov. 7, 1993, at 8.

53. *Baehr v. Lewin* (Hawaii Circuit Court, Klein, J., Sept. 3, 1991). The unpublished decision is discussed and quoted in 1991 LESBIAN/GAY LAW NOTES 65-66.

54. *Id.* at 66.

55. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

56. *Id.* at 58. The Hawaii court rejected the argument that excluding same-sex couples from marriage violated their right of privacy, finding that Hawaii's constitutional right of privacy went no further than the federal privacy right, which the court

Rather, the Hawaii court found that the ban discriminated on the basis of sex, potentially in violation of the express ban on sex discrimination found in the Hawaii constitution. Unlike the earlier courts that had rejected the analogy to *Loving v. Virginia*, the Hawaii court found the analogy persuasive. In *Loving*, the state argued that because both black and white people were equally forbidden from marrying persons of the other race, the state had not discriminated on the basis of race but had imposed the same disability, evenhandedly, on persons of both races.<sup>57</sup> The Supreme Court, rejecting this argument, held in *Loving* that by using race to classify people under the marriage law, the state had discriminated on the basis of race because the state's motivation was to preserve the "purity" of the white race.<sup>58</sup>

Following the same logic, the Hawaii court said that one could lift the key language from the *Loving* opinion, substitute the word "sex" for the word "race," and come to the same conclusion.<sup>59</sup> Although the state had equally forbidden men from marrying men and women from marrying women, it had nonetheless discriminated on the basis of sex by using the sex of an individual to determine whether that person could marry another person. Deciding a question of first impression under the Hawaii Constitution, the court held that if sex is used as a basis of classification under the statute, then the statute must be subjected to strict scrutiny because the Hawaii Constitution only allows sex to be used as a classifying principle when it is necessary to achieve a compelling state interest.<sup>60</sup>

The case is now awaiting trial on the merits, with the issue being whether the Hawaii classification serves a compelling state interest. Prior courts considering the issue of same-sex marriage have always found that the exclusionary policy is justified by the state's desire to preserve marriage as a sanctuary for procreation and child-rearing, and this justification was always considered sufficient under a rationality standard.<sup>61</sup> Whether it will stand up to the requirements of strict scrutiny, under which a policy must be narrowly tailored to achieve a compelling state interest without unduly

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characterized as having been held in *Bowers v. Hardwick* not to protect homosexual relationships. 852 P.2d at 55. *But see*, *Shahar v. Bowers*, 836 F.Supp. 859 (N.D.Ga. 1993), *appeal pending*. (gay relationships protected by right of intimate association).

57. *Loving*, 388 U.S. at 8.

58. *Id.*

59. *Baehr*, 852 P.2d at 68.

60. *Id.* at 67.

61. *See* cases cited in *supra* II.B.

burdening constitutional protections, is a matter for some speculation. It can be plausibly argued that excluding same-sex couples from marriage is not necessary to achieve the state's interest, and may be counterproductive in light of the many same-sex couples who are raising children and for whom obtaining the benefits of marriage will assist their children in the same way that those benefits assist the children of opposite-sex couples. Under strict scrutiny, there must be a "tight fit" between the state's legitimate policy goals and the statutory scheme it adopts;<sup>62</sup> this requirement is unlikely to be met by a statute limiting access to marriage to opposite-sex couples.

If the Hawaii or District of Columbia plaintiffs are successful in obtaining a judicial ruling that the state must issue marriage licenses to same-sex couples, the possibility remains that the people of Hawaii or the District of Columbia Council will vote to overrule their highest courts. The Hawaii court's 1993 decision was followed by the passage of legislation opposing same-sex marriage,<sup>63</sup> but the constitutional basis for the decision makes it likely that a constitutional amendment would be needed to overrule any final judicial determination. In the District of Columbia, were the Court of Appeals to overrule the superior court and remand the matter for trial based on interpretation of the District's marriage law or human rights law, the Council could amend the laws to avoid the court's interpretation. Moreover, Congress, which retains ultimate legislative authority over the District, could enact legislation overruling the court.

### 3. *Full Faith and Credit*

When married people cross state lines, they usually do not question whether their marriage in one state will be considered valid in the next, and nobody entering a valid marriage ceremony expects to encounter difficulties when they file a joint federal income tax return or apply for spousal benefits under the Social Security Act. If certain jurisdictions, such as Washington, D.C. and Hawaii, eventually allow same-sex couples to marry, public officials and courts in other states, and various agencies of the federal government (such as the Internal Revenue Service, the Social Security Administration, and the Immigration and Naturalization Service), will

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62. See *TRIBE*, *supra* note 18, §§ 16-5 to -13, at 1451-66.

63. 1994 HAW. SESS. LAWS 217.



have to determine whether those marriages are entitled to recognition beyond the geographical confines of those jurisdictions.

Article IV, Section 1 of the U.S. Constitution requires that each state give "full faith and credit. . . to the public Acts, Records, and judicial Proceedings in every other State."<sup>64</sup> Federal law dictates that every court in the nation must give full faith and credit to the judicial proceedings and acts of the legislatures "of any State, Territory, or Possession of the United States."<sup>65</sup>

The Supreme Court has held that the Full Faith and Credit clause does not always require a state to give full and preclusive effect to everything a neighboring state does; the state court that is asked to give full faith and credit to a legal proceeding or instrument from another state may determine whether an important state policy might be violated by so doing.<sup>66</sup> In the matter of marriage, it is the normal rule that states do give full faith and credit to marriages that were lawfully contracted in other states.<sup>67</sup> This is most vividly illustrated in the case of common law marriage, which has been statutorily abolished in many states, including New York. In New York the courts will nonetheless recognize common law marriages between New York residents if those common law marriages were validly entered into in a state that recognizes them.<sup>68</sup>

One problem, of course, is that according to the 1970s same-sex marriage decisions, a marriage between persons of the same sex is, by judicial and statutory definition, not a marriage. It seems likely that courts asked to recognize same-sex marriages obtained in other jurisdictions might well take the view that there is "nothing to recognize" because, whatever that other jurisdiction may have sanctioned, it is not a "marriage." If a court determines that it would violate the policies of the state to recognize a same-sex marriage contracted in another state, it seems unlikely that the court would hold that the state is nonetheless required to recognize the

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64. U.S. CONST. art. IV, § 1.

65. 28 U.S.C. § 1738 (1994). A full discussion of the application of this law to federal and state agencies and courts is beyond the scope of this article.

66. See *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954).

67. See, e.g., *Mott v. Duncan Petroleum Trans.*, 414 N.E.2d 657 (N.Y. 1980).

68. *Id.* See also *Ram v. Ramharack*, 150 Misc.2d 1009, 571 N.Y.S.2d 190 (Sup. Ct. 1991). For some examples of court decisions holding that full faith and credit will be accorded common law marriages entered into in other jurisdictions, see, e.g., *Anderson v. Anderson*, 577 So.2d 658 (Fla. App. 1991); *Estate of Hendrickson*, 805 P.2d 20 (Kan. 1991); *Leszinske v. Poole*, 798 P.2d 1049 (N.M.App. 1990), cert. denied, 797 P.2d 983 (N.M. 1990); *Hager v. Hager*, 349 S.E.2d 908 (Va. App. 1986); *Peffley-Warner v. Bowen*, 778 P.2d 1022 (Wash. 1989); *Estate of Foster*, 376 S.E.2d 144 (W. Va. 1988).

same-sex marriage under the Full Faith and Credit clause. But this result is by no means compelled.<sup>69</sup>

Whether federal agencies would have to respect a same-sex marriage that is valid under state law has been addressed in *Adams v. Howerton*,<sup>70</sup> in which the Immigration and Naturalization Service (INS) refused to recognize a same-sex marriage contracted between a U.S. citizen and an Australian citizen in Boulder, Colorado. The county clerk in Boulder issued two men a marriage license and they had a wedding performed by a local minister.<sup>71</sup> Press coverage led a member of the state legislature to request an opinion from the state's attorney general as to the validity of the marriage. The attorney general, in an informal opinion, said that the marriage was not valid under state law.<sup>72</sup> The INS refused to treat the Australian as the lawful spouse of an American citizen and threatened deportation.

Ruling on Adams' claim that the INS was bound to recognize a lawful Colorado marriage, the Ninth Circuit Court of Appeals held that Congress intended for the INS to determine whether a marriage was valid for purposes of federal law, and that the validity of the marriage under state law was not controlling, assuming that Colorado would consider this marriage to be valid.<sup>73</sup> Furthermore, applying the "plain meaning" rule to the undefined term "spouse" in the statute, Circuit Judge Wallace found that the common meaning of that term referred to opposite-sex couples only.<sup>74</sup> In a subsequent decision, the Ninth Circuit upheld the INS's determination that the couple was not entitled to a waiver of deportation under an extreme hardship exception.<sup>75</sup> Subsequently, Australia changed its immigration policies to permit the emigration of same-sex partners of Australian citizens, making it possible for this couple to live together in that country.<sup>76</sup>

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69. For example, the Hawaii Supreme Court's intermediate opinion in *Baehr* entertained no doubts that a same-sex marriage could be a "marriage" within the meaning of Hawaii's marriage laws.

70. 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

71. *Id.* at 1038.

72. *Id.* at 1039.

73. *Id.*

74. *Id.* at 1040.

75. *Sullivan v. Immigration and Naturalization Serv.*, 772 F.2d 609 (9th Cir. 1985).

76. Marianne MacDonald, *Gay Immigration Officer Forged Passport*, THE INDEPENDENT, April 27, 1994, at 6. MacDonald reports that the following countries now recognize same-sex couples for this purpose: Denmark, Norway, Sweden, the Netherlands, Australia and New Zealand. For more information on the impact of immigration policies on homosexual couples, see Kim Heinrich, *Reunion of Gay Couple Thwarted*, VANCOUVER SUN, June 26, 1992, at B6; Jonathan Mandell, *Ban of*

If *Adams v. Howerton* is followed as precedent, same-sex marriages authorized under state law will probably not be seen as binding on federal agencies. Assuming that the Full Faith and Credit clause does not operate as a restriction on the legislative or executive branches of the federal government, the result in *Adams* seems correct as a matter of federal law, although *Adams* would be readily distinguishable from a case in which there was no doubt about the validity of the same-sex marriage in the state where it was lawfully contracted.

### III. Non-Marital Recognition of Same-Sex Families

Seeking same-sex marriage is not a universal goal in the lesbian and gay rights movement. When lesbian and gay legal organizations decided during the 1980s not to pursue gay marriage litigation, the decision was fueled in part by the argument that marriage was a patriarchal institution, rooted in heterosexual tradition and male privilege, and to be avoided by the sexually egalitarian lesbian and gay rights movement. Many argued that lesbians and gay men, as social pioneers, were in a position to structure new, equitable arrangements suitable for same-sex couples unburdened by the historical baggage of traditional marriage. For those holding this view, the appropriate course was to seek legal recognition for non-marital alternatives to the traditional marital family in each context where the law places importance on a family connection. This part of the article will describe a variety of contexts in which such claims have been raised.

#### A. Housing Rights

One of the first appellate decisions to recognize a same-sex couple as a family unit was *Braschi v. Stahl Associates*, a 1989 decision by the New York Court of Appeals.<sup>77</sup>

Miguel Braschi and Leslie Blanchard, both gay men, had lived together in Blanchard's rent-controlled apartment in New York City as a couple for many years.<sup>78</sup> After Blanchard died from

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*Matrimony: Gay Immigrants Can't Say 'I Do' or 'I Swear,'* NEWSDAY, June 13, 1994, at A12.

77. 543 N.E.2d 49 (N.Y. 1989). See *SEXUALITY AND THE LAW*, *supra* note 24, at 364-367, for a more complete discussion of this case. See generally Paris R. Baldacci, *Pushing the Law to Encompass the Reality of Our Families: Protecting Lesbian and Gay Families from Eviction from their Homes—Braschi's Functional Definition of "Family" and Beyond*, 21 FORDHAM URB. L.J. — (1994).

78. *Braschi*, 543 N.E.2d at 50-51.

AIDS, the landlord threatened Braschi with eviction.<sup>79</sup> Braschi brought an action seeking protection under a rent control regulation that prohibited the eviction of a surviving family member who resided in a rent-controlled apartment when the tenant of record died.<sup>80</sup>

Justice Harold Baer, Jr. ruled in an unpublished opinion that the relationship between Braschi and Blanchard "fulfills any definitional criteria of the term 'family,' " which was undefined in the regulation, and that they "were economically, socially and physically a couple like any traditional couple except their relationship could not be legally consummated."<sup>81</sup>

The Appellate Division reversed in a brief *per curiam* opinion, finding that the undefined term "family" should be construed in accord with legislative intent, and that there was no indication that the legislature "was also including and granting legal status and recognition to nontraditional family relationships" when it included protection for surviving family members in the rent control code.<sup>82</sup> The court found that since the regulation was in derogation of common law property rights of the landlord, it should be strictly construed.<sup>83</sup>

Braschi appealed, arguing that excluding him from the protection of the regulation violated equal protection as well as the common sense meaning of the regulation. The Court of Appeals avoided the constitutional question by agreeing with Justice Baer that the regulation should be broadly construed to achieve its overarching purpose of preventing evictions of family members upon the death of a rent-controlled tenant. In a plurality opinion, Judge Vito Titone wrote:

[F]amily. . . should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.<sup>84</sup>

Interestingly, Judge Titone's opinion does not focus on the genders of Blanchard and Braschi. Because Blanchard's first name,

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79. *Id.* at 51.

80. *Id.*

81. *SEXUALITY AND THE LAW*, *supra* note 24, at 365.

82. *Stahl Associates Co. v. Braschi*, 531 N.Y.S.2d 562 (App. Div. 1988).

83. *Id.* at 45.

84. 74 N.Y.2d at 211.

Leslie, could belong to a person of either gender, one could read the plurality opinion without concluding that the case even involved a same-sex couple, apart from one footnote reference to homosexuals. Indeed, in subsequent litigation it became clear that the opinion did not apply only to same-sex couples, as courts applied its rationale to a variety of non-traditional family units.<sup>85</sup> This helped to make the decision broadly acceptable, leading the State Division of Housing and Community Renewal, the agency responsible for promulgating rent regulations, to codify the decision and extend it from the relatively small rent controlled sector to the much larger rent stabilized sector of the New York rental housing market, an action subsequently upheld by the Court of Appeals as an appropriate exercise of administrative discretion.<sup>86</sup>

### B. Guardianship for a Partner With Diminished Capacity

In an important recognition of a same-sex couple as a family, the Minnesota Court of Appeals held that a trial court should have acknowledged the same-sex relationship of a woman who had been severely disabled in an automobile accident by appointing her partner to be her legal guardian.<sup>87</sup>

Sharon Kowalski, who had lived in a same-sex relationship with Karen Thompson for four years, was seriously brain-damaged and paralyzed as a result of an automobile accident.<sup>88</sup> At first she could not clearly communicate her own wishes. Kowalski and Thompson had not executed any formal documents signifying their relationship (such as a partnership agreement, joint wills or powers of attorney, living wills or health care proxies), and had not informed Kowalski's parents or siblings about the nature of their relationship.<sup>89</sup> When Thompson told Kowalski's parents about the nature of the relationship, they eventually moved to exclude Thompson from contact with Sharon. The father, Donald Kowalski, sought and obtained appointment as Sharon's guardian, with

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85. See, e.g., 2-4 Realty Assocs. v. Pittman, 547 N.Y.S.2d 515 (App. Div. 1989) (finding parent-child relationship between tenant and unrelated son of woman who was boarding in tenant's apartment); Batsikas v. Ligouri, 567 N.Y.S.2d 340 (N.Y.C. Civ. Ct. 1991) (finding great-nephew has succession rights to great-aunt's apartment, despite lack of blood relation).

86. Rent Stabilization Association v. Higgins, 630 N.E.2d 626, 629 (N.Y. 1993), cert. denied, 114 S.Ct. 2693 (1994).

87. In re Guardianship of Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991), review denied, Feb. 10, 1992. For a more detailed treatment of this case, see *SEXUALITY AND THE LAW*, *supra* note 24, at 377-382.

88. Kowalski, 478 N.W.2d at 791.

89. *Id.*

the right to control who would have access to her.<sup>90</sup> Thompson instituted litigation seeking access to her partner, but was repeatedly rebuffed by the Minnesota courts.<sup>91</sup>

Thompson decided to publicize her legal struggle, and obtained national support for her campaign to restore contact with her partner.<sup>92</sup> Finally, worn down by the prolonged litigation and unwanted media attention, and responding to a decision by District Judge Robert V. Campbell to order a new medical evaluation of Sharon to determine whether she was capable of expressing her wishes as to guardianship, Donald Kowalski signalled his willingness late in 1988 to relinquish the guardianship. Thompson filed a new guardianship petition, and Judge Campbell scheduled a hearing. Although Thompson's petition was unopposed, a friend of the Kowalskis, Karen Tomberlin, wrote to the attorney appointed by the court to represent Sharon's interests and suggested herself as a new "neutral" guardian who could mediate between the Kowalski family and Thompson.<sup>93</sup> Although all the professional opinion offered at the hearing supported awarding the guardianship to Thompson, Campbell decided to appoint Tomberlin, and Thompson appealed.<sup>94</sup>

Writing for the court of appeals, Judge Jack Davies refuted every finding and ruling made by Campbell, including the preference for a "neutral" guardian.<sup>95</sup> After reviewing the lengthy trial record, which supported finding that Sharon could and did express a preference to have Thompson as her guardian and that such an appointment would be in Sharon's best interest, Judge Davies concluded that Campbell had abused his discretion by appointing Tomberlin.<sup>96</sup> Finally, and without any further explanation, Judge Davies asserted that the choice of Thompson as guardian "is further supported by the fact that Thompson and Sharon are a family of affinity, which ought to be accorded respect."<sup>97</sup>

Karen Thompson's battle to be reunited with her partner and to establish a legal family tie with her through appointment as her

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90. *Id.* at 791.

91. *In re Guardianship of Kowalski*, 382 N.W.2d 861 (Minn. Ct. App.), *cert. denied*, 475 U.S. 1085 (1986); *In re Guardianship of Kowalski*, 392 N.W.2d 310 (Minn. Ct. App. 1986).

92. *See* *SEXUALITY AND THE LAW*, *supra* note 24, at 379.

93. *Kowalski*, 478 N.W.2d at 792.

94. *Id.*

95. *Id.* at 792-96.

96. *Id.* at 797.

97. *Id.*

guardian took eight years from the time of the accident until the Minnesota Supreme Court's refusal to review the court of appeals' decision.<sup>98</sup> Thompson and Kowalski had become a symbol of the struggles encountered by same-sex couples in times of adversity, and were cited by lesbian and gay attorneys to their clients as object lessons about the consequences of avoiding "coming out" to family members and execution of documents that could evidence the nature of a relationship. The final decision of the court, however, provides an important precedent for the proposition that a "family of affinity" should be respected when a judge with equitable powers is called upon to make an appointment of this kind.<sup>99</sup>

### C. Same-Sex Adult Adoption

Given the lack of widespread popular support for the idea of same-sex marriage, it seems unlikely that legislatures will be authorizing such marriages anytime soon. An alternative mechanism for establishing legal family ties between adults of the same sex might be available through the mechanism of adoption. In 1993, the Delaware Supreme Court became the first high appellate court to approve an adult adoption in the context of a gay relationship, in *In re Adoption of Swanson*.<sup>100</sup>

This sort of adoption first became a significant issue in litigation in New York City during the early 1980s arising out of the tight rental housing market. Under the rent regulation system in New York, residential rents were kept far below market rates. Landlords had a strong incentive to find lease violations as a basis for evicting tenants because eviction under the regulations allowed landlords an extra rent increase from a new tenant.<sup>101</sup> The standard form lease used by the landlords had a provision restricting occupancy to the tenant and members of the tenant's family, who

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98. See *SEXUALITY AND THE LAW*, *supra* note 24, at 382.

99. In August, 1994, the California legislature approved a bill, Assembly Bill No. 2810, that would establish a domestic partnership registry and extend recognition to registered partners on the same basis as spouses for the following purposes: (1) joint liability for debts for household expenses, (2) visitation rights in hospitals, (3) participation in conservatorship proceedings (including priority for appointment as a conservator for a registered partner), (4) inclusion of registered partners as a potential beneficiary on the standard California wills form set out in the Probate Code for those who want to make a simple will. Governor Pete Wilson vetoed the bill, asserting that its provisions were not necessary. Greg Lucas, *Governor Vetoes Bill on Domestic Pairs*, SAN FRANCISCO CHRONICLE, Sept. 12, 1994, at A1.

100. 623 A.2d 1095 (Del. 1993). "Swanson" is a pseudonym adopted by the court to protect the confidentiality of the parties.

101. See *SEXUALITY AND THE LAW*, *supra* note 24, at 326-332.

were defined as legal relatives. Landlords brought actions to terminate leases and evict tenants when they discovered that the tenants were living with unrelated "roommates." Many of these actions were filed against gay tenants who invited their lovers to move in with them.

At the same time, seeking to realize some cash from their investments, many landlords during the early 1980s sought to convert their buildings into cooperatives by selling shares in the building to the tenants. The typical cooperative offering plan restricted the offer to tenants in residence and their family members. Therefore, gay tenants and their partners could not jointly take advantage of the offers to purchase the apartments in which they lived. Gay tenants sought to avoid these problems by adopting their partners, and met with mixed success in the lower courts in having their petitions approved.<sup>102</sup>

One unsuccessful couple, Jack Mitchell and Robert Paul Pavlik, appealed the denial of their petition to the Court of Appeals, which ruled in 1984 that the adoption statute could not be used for this purpose.<sup>103</sup> "Our adoption statute embodies the fundamental social concept that the relationship of parent and child may be established by operation of law," wrote Judge Matthew Jasen, holding that the New York adoption laws "reflect the general acceptance of the ancient principle of *adoptio naturam imitatur*," i.e., that adoption imitates nature in creating a parent-child relationship where none had previously existed.<sup>104</sup> To Judge Jasen, such a concept could not be reconciled with the use of adoption as a "quasi-matrimonial vehicle to provide nonmarried partners with a legal imprimatur for their sexual relationship, be it heterosexual or homosexual."<sup>105</sup> Judge Jasen had missed the point of the proceeding, which was not to sanction a sexual relationship, but rather to gain legal recognition of the reality of a family unit. Judge Jasen opined that it would be "utterly repugnant to the relationship between child and parent in our society" to approve an adoption where a sexual relationship between the child and the parent was the basis for the relationship.<sup>106</sup> In addition, the case was not

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102. See *In re Adoption of Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984); *In re Adult Anonymous II*, 452 N.Y.S.2d 198 (App. Div. 1982); *In re Adult Anonymous*, 435 N.Y.S.2d 527 (Fam. Ct. 1981). For a more detailed treatment of these cases, see *SEXUALITY AND THE LAW*, *supra* note 24, at 326-332.

103. *In re Adoption of Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984).

104. *Robert Paul P.*, 471 N.E.2d at 425.

105. *Id.*

106. *Id.*



helped by the prospective adoptive parent being younger than the prospective adoptive child, given the court's insistence that the statute meant to replicate a "natural" family.

The decision in *Robert Paul P.* did not put a halt to same-sex gay adult adoptions in New York. However, judging by informal reports received by this writer from attorneys in the field, the incentive for gay adult adoptions was sharply reduced when the legislature amended the Real Property Law to require landlords to allow tenants to have unrelated roommates.<sup>107</sup> The legislative action came in response to a decision by the Court of Appeals enforcing a families-only lease provision against a woman tenant and her male lover in 1983,<sup>108</sup> which generated the necessary political coalition between tenants' rights groups and lesbian and gay groups to achieve legislative reform.

But there are other reasons why gay people might want to adopt their partners. Establishing legal family ties might lessen the ability of estranged blood family members to contest testamentary dispositions, could avoid the problems encountered by Kowalski and Thompson, and would be beneficial for estate tax purposes. Hoping to benefit their estate planning, a gay couple decided to pursue the possibility of adoption in Delaware, but was unsuccessful in the family court, which held in an unpublished opinion that the Delaware adoption statute, like New York's, intended to imitate nature and did not authorize a same-sex adult adoption for the purposes contemplated by the petitioner.<sup>109</sup>

The Delaware Supreme Court unanimously reversed, finding that the Delaware statute, on its face, posed only limited technical requirements for prospective adult adoptions, which were met by the petitioner.<sup>110</sup> Indeed, the court found that the various estate planning considerations motivating the parties were well-founded in the history of adult adoption, which dated back to ancient times as a device for a childless person of means to establish a family line through the adoption of a favored younger friend.<sup>111</sup>

Unlike New York, Delaware had not included in its adoption statute a requirement for the court to make a finding about the "best interest of the child" as a prerequisite for an adult adoption,

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107. N.Y. REAL PROP. LAW § 235-f (McKinney 1989).

108. *Hudson View Properties v. Weiss*, 450 N.E.2d 234 (N.Y. 1983).

109. *In re the Adoption of John A.S.*, No. 91-09-02-A, 1992 WL 361416 (Del. Fam. Ct. Oct. 5, 1992).

110. *Adoption of Swanson*, 623 A.2d 1095.

111. *Id.* at 1098.

tending to negate the contention that an adoption could be used only to establish a parent-child relationship in imitation of nature. But even if Delaware's statute were not so readily distinguishable from New York's, it appears that the court might have reached the same result, because Justice Moore, writing for the unanimous court, apparently found New York Judge Jasen's opinion unpersuasive, and noted "the compelling dissent in . . . *Robert Paul P.* . . . , taking the majority to task for imposing limitations on the process that are not found in New York's adult adoption statute."<sup>112</sup>

While there are no reports of a rush to adopt among lesbian and gay Delawareans, or a massive movement of gay people into that state for that purpose, the court's decision provides an interesting precedent for extending legal recognition to a same-sex relationship outside the context of marriage.

#### **D. Employment Benefits**

Another area where the struggle for recognition of same-sex families has made notable progress is in the obtaining of employment benefits. Employee benefit plans, which represent a significant portion of employee compensation, typically predicate eligibility for certain benefits on recognition of family status. For example, a health benefit plan may extend eligibility to the spouse, children or other dependent family members of an employee, either at the employer's cost or with a contributory payment by the employee. Employers may provide death benefits to surviving spouses or children of employees, and usually have bereavement leave policies that authorize paid time off on the death of a spouse or member of the spouse's immediate biological family (e.g., parents or siblings). In addition, employers may authorize use of sick leave or family leave to care for an ailing spouse or child. If employers do not recognize the non-marital domestic partners (and children of non-marital partners) of their employees as family members, those employees receive less compensation than their married colleagues for performing the same work. They also may suffer significant financial pressure if their partners (and partner's children) are not otherwise covered by an employee benefits plan.

Progress on this issue in the private sector has to be voluntary on the part of employers. The federal government has neither legislated to mandate or authorize the recognition of domestic partners under employee benefit plans, nor generally forbidden employ-

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112. *Id.*

ment discrimination on the basis of marital status or sexual orientation.<sup>113</sup>

In addition, the federal Employee Retirement Income Security Act (ERISA)<sup>114</sup> preempts state and local governments from attempting to regulate employee benefits,<sup>115</sup> thus precluding them from either directly requiring private employers to recognize employee domestic partners or indirectly requiring such recognition through the enforcement of general antidiscrimination statutes.<sup>116</sup> However, ERISA does not preempt states from regulating the practices of insurance companies,<sup>117</sup> so states could theoretically legislate to require insurance companies to include domestic partnership recognition in the group insurance products they offer to employers, although no states have yet done so. Indeed, state insurance regulations might prove a stumbling block if they do not provide insurance companies with the flexibility to develop group policies that recognize domestic partnership families.

Many large employers now provide health benefits through a mechanism called self-insurance. Rather than purchasing a group policy from an insurance company, the employer will directly pay the medical expenses of employees and dependents covered by the plan, although an employer may hire an insurance company to act as an administrator for the employer's group. By adopting self-insurance, the employer effectively escapes indirect state regulation of its employee health plan, and is free to define the scope and coverage of the plan without state interference. Such employers may be more free to adopt domestic partnership benefit plans,

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113. Federal regulation intrudes in this sphere in another sense, however, since federal tax laws adopt a traditional definition of the family in dealing with the taxability and deductibility of employee health benefits. Employers may deduct as a business expense the cost of providing health insurance to employees and their family dependents (as defined by federal law), and employees may exclude from their taxable income the value of such benefits. 26 U.S.C. § 106 (1989). This preferential tax treatment is not necessarily available for domestic partnership benefits, in the absence of proof that the partner is economically dependent on the employee. Priv. Ltr. Rul. 92-31-062 (May 7, 1992).

114. 29 U.S.C. §§ 1001-1461 (1974).

115. 29 U.S.C. § 1144(a) (1974).

116. This preemption problem would not be solved by passage of the Employment Non-Discrimination Act of 1994 ("ENDA"), introduced in Congress on June 23, 1994. S. 2238, H.R. 4636, 103d Cong., 1st Sess. (1994). Although ENDA would ban sexual orientation discrimination in employment by those employers large enough to be covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2005f, Section 4 of ENDA specifically provides: "This Act does not apply to the provision of employee benefits to an individual for the benefit of his or her partner." Consequently, ERISA preemption would theoretically not be affected by passage of ENDA.

117. 29 U.S.C. § 1144(b)(2) (1974).

since they need not be concerned with whether an insurance company is willing to sell them an appropriate plan.

As a result, private sector employers that have granted such recognition have done so either through collective bargaining with unions, or by voluntary agreement in response to requests from individuals or groups of employees. Among the first employers to establish a domestic partnership benefits plan was *The Village Voice*, a weekly newspaper in New York City, as part of a collective bargaining agreement with the Newspaper Guild, a union representing its editorial and clerical staff. Most recently, unions representing attorneys at the Legal Aid Society of New York and Legal Services for New York City have achieved collective bargaining agreements providing domestic partnership recognition and benefits. Several large employers—most notably in the computer services and entertainment industries and in higher education—have voluntarily extended their employee benefits plans to recognize domestic partnership families.<sup>118</sup>

The possibility that voluntary adoption of a non-discrimination policy covering sexual orientation might require an employer to recognize domestic partnership families was confirmed in *Grievance of B.M., S.S., C.M. and J.R.*,<sup>119</sup> in which the Vermont Labor Relations Board found merit in a grievance filed by employees of the University of Vermont protesting the university's failure to provide such benefits. The university argued that because it excludes unmarried heterosexual partners from benefits eligibility, the exclusion of unmarried gay couples did not constitute sexual orientation discrimination. The Board decided that it could use a disparate impact analysis; because gay couples cannot marry in Vermont, they are disproportionately affected by the limitation of eligibility to traditional marriage families, so the limitation was found to violate the non-discrimination policy.<sup>120</sup> Because the university is a public employer, the Board did not have to concern itself with ERISA preemption, which might stand in the way of an attempt to require a private sector employer to extend benefits based on a voluntarily adopted non-discrimination policy. In the case of a private sector employer, however, ERISA preemption

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118. Jennifer Steinhauer, *Increasingly, Employers Offer Benefits to All Partners*, N.Y. TIMES, Aug. 20, 1994, at B1; Jay Mathews, *Gay Partners Gain Benefits*, WASH. POST, Oct. 2, 1993, at A1.

119. No. 92-32 (Vt. Lab. Rel. Bd., June 4, 1993) (unpublished opinion).

120. *Id.*

would not be a problem if the non-discrimination policy was iterated in the actual plan documents.<sup>121</sup>

In the public sector, where ERISA preemption is not a concern,<sup>122</sup> employees have sued with limited success to establish that their same-sex partners are entitled to coverage under group health plans that cover family members of employees, using constitutional theories of equal protection and statutory theories based on state or local ordinances forbidding marital status or sexual orientation discrimination.<sup>123</sup> In some municipalities, employee groups allied with lesbian and gay political organizations in coalition with other organizations, such as public sector labor unions, have been successful in encouraging passage of ordinances extending benefits eligibility to the unmarried partners of city employees.<sup>124</sup> On a

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121. In *Rovira v. American Telephone & Telegraph Co.*, 817 F. Supp. 1062 (S.D.N.Y. 1993), the surviving same-sex domestic partner of an AT&T employee claimed a survivor's death benefit. The company's employee benefit plan limited eligibility for such benefits to spouses and children of the employee. The company had adopted a non-discrimination policy in its personnel manual that included sexual orientation, and purported to apply to all terms and conditions of employment. *Rovira* sued under ERISA, which authorizes federal court suits by employees to enforce their rights under ERISA-covered employee benefit plans. The court ruled that because the non-discrimination policy was not contained in the formal benefit plan document, it was not a part of the plan that could be enforced in an ERISA action in federal court. Further, the court found that the promise of non-discrimination embodied in the company's policy ran to employees, not to "third parties." By implication, had the non-discrimination policy been contained within the plan documents, an ERISA enforcement suit might be available.

122. ERISA does not apply to employee benefit plans maintained by state or local public employers. 29 U.S.C. 1003(b)(1) (1988).

123. Some of the notable lawsuits included *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410 (1985) (denying domestic partnership entitlement in dental benefits plan for state employees); *Anglin v. City of Minneapolis*, File No. 88180 (Minneapolis Comm'n on Human Rts. 1992) (finding that city human rights ordinance requires extension of domestic partnership benefits to city employees); *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121 (Wis. 1992) (state law banning sexual orientation discrimination does not require extension of partnership benefits to state employees); *Gay Teachers Ass'n v. Bd. of Education*, 585 N.Y.S.2d 1016 (App. Div. 1992) (organization of gay teachers stated viable cause of action in seeking domestic partnership benefits under a variety of constitutional and statutory theories).

124. For example, a successful combination of litigation and lobbying occurred in New York City, where several city school teachers and the Gay Teachers Association sued in state court, relying on a variety of constitutional and statutory theories, to achieve domestic partnership insurance coverage. While the city's motion to dismiss was pending, the Court of Appeals issued its decision in *Braschi v. Stahl Associates*, recognizing a domestic partnership family for purposes of rent control regulations. Reacting to *Braschi*, then-Mayor Edward I. Koch issued an executive order in the midst of the 1989 mayoral election, authorizing recognition of domestic partnership families for the purposes of sick leave, bereavement leave, and hospital and prison visitation rights for city employees, and establishing a partnership registry in the city personnel office. Exec. Order No. 123 (Koch, 1989). While the trial judge refused to

smaller scale, some municipalities and at least one state, Massachusetts, have extended family-related eligibility for some "non-economic" benefits, such as sick leave, family leave, and bereavement leave, sometimes by legislation and sometimes by executive order.<sup>125</sup> In addition, the states of Vermont and New York have ex-

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dismiss the *Gay Teachers* suit, in *Gay Teachers Association v. Board of Education*, N.Y. L.J., Aug. 23, 1991, at 22, col. 3 (N.Y. Sup. Ct.), a coalition of community groups encouraged City Councilmember Carolyn Maloney to file a bill establishing a registry in the city clerk's office and mandating recognition of domestic partner families for all city benefits purposes through the device of an amendment to the city's human rights ordinance. In 1992, the Appellate Division affirmed the trial judge's ruling, citing *Braschi* and remanding the case for a full trial on the merits, *Gay Teachers Association v. Board of Education*, 585 N.Y.S.2d 1016 (App. Div. 1992).

Mayor David N. Dinkins, partially fulfilling a campaign pledge, issued new executive orders expanding on the Koch orders, Exec. Orders Nos. 48 and 49 (Dinkins, Jan. 1993), although still falling short of full domestic partnership benefits, and announced that he would support enactment of the domestic partnership bill. The mayor also sent a letter to the state insurance commissioner, urging an appropriate interpretation of the State Insurance Law that would allow insurance companies to sell group policies with domestic partnership coverage. Then, a newly-formed coalition of lesbian and gay city employees filed a charge with the Human Rights Commission, asserting that the city was violating its own human rights ordinance by failing to extend domestic partnership benefits to its employees, and the Commission issued a probable cause determination on May 28. *Coalition of Lesbian & Gay City Employees v. City of New York* (N.Y.C. Comm'n on Human Rts., May 28, 1993).

As the 1993 mayoral election neared and lesbian and gay political organizations targeted domestic partnership as their main campaign issue, the insurance commissioner issued a letter adopting the necessary interpretation of the state insurance law, and the mayor negotiated a settlement of the lawsuit with the plaintiffs, contingent upon agreement with municipal unions, which was achieved just days before the election. The trial judge entered an order dismissing the case contingent on the city providing the benefits as described in the settlement agreement, which newly-elected Mayor Rudolph Giuliani has acknowledged as binding on the city. Nonetheless, lesbian and gay political groups planned to reintroduce a new version of the domestic partnership bill in the newly-elected city council, hoping to provide a firmer grounding for the continued operation of the benefit plan.

Municipalities that have passed domestic partnership ordinances include Ann Arbor (Mich.), Atlanta (Ga.), Austin (Tex.), Berkeley (Cal.), Brookline (Mass.), Burlington (Vt.), Cambridge (Mass.), East Lansing (Mich.), Minneapolis (Minn.), San Francisco (Cal.), Seattle (Wash.), West Hollywood (Cal.). I make no claims of completeness for this list. The Boston City Council passed an ordinance that was vetoed by Mayor Raymond Flynn, who simultaneously issued an executive order recognizing domestic partner families of city employees for non-economic benefits. The District of Columbia Council passed a domestic partnership law, but Congress prohibited the District from spending any money to implement it. The Los Angeles City Council has passed a domestic partnership ordinance, which awaits approval from the mayor as this is written.

125. Adrian Walker, *City Council OK's Gay-Couples Act; Permits Registration, Ensures Rights*, BOSTON GLOBE, Dec. 16, 1993, at 38; Toni Locy, *Weld Gives Family Leave to Some Gays*, BOSTON GLOBE, Sept. 24, 1992, at 34.

tended domestic partnership health insurance benefits to state employees through collective bargaining.<sup>126</sup>

While comparatively few employers recognize domestic partnership families under their employee benefits plans, the number is growing and the issue has become a topic of considerable discussion in personnel management circles. As experience in operating such plans accumulates, generating data on costs and administrative issues, more employers may become convinced that extending such benefits is a cost-effective way to make their workplaces more attractive to a wider variety of potential employees. Depending on the final form taken by current proposals to restructure the way health care costs are covered in the United States, domestic partnership coverage may become either a significant subject of public policy debate at the federal level, or irrelevant, as it would be, for instance, under a single payor national health insurance system in which eligibility for coverage does not hinge on family status.

### E. Co-Parenting Rights

Parental rights for lesbians and gay men have always been a controversial subject. Among the earliest reported court decisions involving homosexuality are many relating to custody or visitation claims asserted by lesbians or gay men for their children conceived within traditional heterosexual marriages.<sup>127</sup> While much progress has been made in establishing that sexual orientation *per se* should not be a disqualification for the exercise of parental rights, lesbians and gay men still encounter difficulties in custody or visitation disputes involving their own biological offspring, especially in jurisdictions that retain criminal sodomy laws, such as Virginia and Missouri.<sup>128</sup> Judges express fear that the welfare of the children

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126. *Vermont Workers Win Health Benefits*, N.Y. TIMES, June 13, 1994, at A13; Jane Gottlieb, *PEF Agrees to Domestic Partner Benefits*, ALBANY TIMES UNION, Sept. 28, 1994, at B2.

127. See, e.g., *Nadler v. Superior Court*, Sacramento County, 63 Cal. Rptr. 352 (Ct.App., 3rd Dist. 1967).

128. See, e.g., *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985); *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. App. 1987). During 1993, national media attention focused on a Virginia trial court decision awarding custody to a grandmother based primarily on the natural mother's lesbian "lifestyle." *Bottoms v. Bottoms*, No. CH93JA0517-00 (Va. Cir. Ct., Sept. 7, 1993). The Virginia Court of Appeals reversed, 444 S.E.2d 276 (Va. Ct. App. 1994), but the grandmother is appealing the decision. See Elizabeth Kastor, *The Battle for the Boy in the Middle*, WASH. POST, Oct. 1, 1993, at C-1; Dianna Marder & Ellen O'Brien, *For Lesbian, Gay Parents, Shaky Rights*, PHILA. INQUIRER, Sept. 12, 1993, at E-1; Linda P. Campbell, *Custody Ruling Fuels Gay Rights Discussion*, CHI. TRIBUNE, Sept. 12, 1993, at 25. For a more detailed discussion of *Roe v. Roe* and *S.E.G. v. R.A.G.*, see SEXUALITY AND THE LAW, *supra* note 24, at 332-35, 342-45.

may be endangered by the parent's "illicit" lifestyle or relationships with same-sex partners, and also opine that the children may feel stigmatized by societal prejudice against their parents.<sup>129</sup> Ironically, in a case involving child custody in the context of an interracial re-marriage, the Supreme Court has firmly indicated that the latter concern should not take priority in a custody determination,<sup>130</sup> but some judges have taken the view that the Court's decision in that case turned on the special nature of racial discrimination and the treatment of race as a suspect classification under the Fourteenth Amendment.<sup>131</sup>

While every lesbian or gay custody or visitation case implicates the recognition of a lesbian or gay family unit, the issues are heightened in cases where a lesbian or gay couple seeks to constitute a family unit with children and have that unit treated on an equal basis with traditional family units founded on opposite-sex married couples. In jurisdictions where the initial hurdle of establishing equal rights of lesbians and gay men to parent their own natural-born offspring has been surpassed, some courts have been receptive to taking the next step and recognizing the possibility that both partners in the relationship should be treated as parents with respect to the children they are raising.

The issue has come before the courts in several different scenarios: when a couple breaks up, and the partner who originally bore or solely adopted the child (who may be referred to in court papers and argument as the "birth parent," "natural parent" or "biological parent") seeks to exclude the other partner from continued contact; when the partner who originally bore or solely adopted the child dies, and the other partner wishes to retain custody of the child; when a child is conceived through alternative insemination, and a known sperm donor seeks to establish parental rights over the objections of the lesbian co-parents; and when a partner wishes to become a legal parent through adoption of the child borne or previously adopted by his or her same-sex partner.

### *1. Co-Parent Status After Dissolution of a Relationship*

Courts have been least receptive to recognizing a lesbian and gay family unit (and equal parental rights for both partners in the unit)

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129. See cases cited *supra*, note 128.

130. *Palmore v. Sidoti*, 466 U.S. 429 (1984). "Private biases may be outside the reach of the law," said the Court, "but the law cannot, directly or indirectly, give them effect." *Id.* at 433.

131. See *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. App. 1987).



in circumstances where the co-parents have ended their relationship, with their child left in the custody of the birth or adoptive parent, and without the co-parent having established a legal tie to the child through adoption. With rare exceptions, the courts have held that the partner who lacks such legal ties does not even have standing to bring an action for custody or visitation.<sup>132</sup> The courts have reached this conclusion without even getting into the question whether custody or visitation by this partner would be in the best interest of the child, which is the normal test in custody disputes between birth or adoptive parents.<sup>133</sup>

In *Matter of Alison D. v. Virginia M.*,<sup>134</sup> for example, the courts confronted a statutory regime in which the term "parent" was not specifically defined. The statute authorized "either parent" to bring an action to determine custody or visitation rights upon or after the termination of a marriage.<sup>135</sup> Reflecting a well-established hostility toward allowing persons other than natural parents to interfere with the custody of a natural parent,<sup>136</sup> the court treated the lesbian co-parent as a "biological stranger." The court insisted that where a child was in the custody of a birth parent, that parent's right to determine whether a particular "non-parent" should have access to the child must be protected. In short, it was presumed, absent "extraordinary circumstances,"<sup>137</sup> that a birth parent who is fit to have custody is the person best placed to decide

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132. One extraordinary exception was an unpublished decision in *Loftin v. Flournoy*, No. 569630-7 (Cal. Super. Ct., Nov. 2, 1984), in which the co-parent contesting custody was also the biological aunt of the child because her brother donated the sperm used to conceive the child. There, the court found this blood relationship sufficient to overcome the usual treatment of co-parents as "biological strangers" lacking standing. See E.D. Shapiro and S. Schultz, *Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions*, 24 J. FAM. L. 271 (1985-86), which contains extensive quotations from the transcript and findings of the court. In another case, a New Mexico court appeared to open the door to the possibility of according recognition to a co-parent in the context of visitation, at least to the extent of refusing to dismiss such a case on summary judgment before trial, *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992), *cert. denied*, 827 P.2d 837 (1992).

133. See, e.g., *Z.J.H.*, *Interest of (Sporleder v. Hermes)*, 459 N.W.2d 602 (Wis. Ct. App. 1990); *Curiale v. Reagan*, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *Kulla v. McNulty*, 472 N.W.2d 175 (Minn. Ct. App. 1991); *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Cal. Ct. App. 1991).

134. 572 N.E.2d 27 (N.Y. 1991). For a more detailed consideration of this case, see *SEXUALITY AND THE LAW*, *supra* note 24, at 371-76.

135. N.Y. DOM. REL. LAW § 70 (McKinney 1988).

136. See, e.g., *Ronald FF. v. Cindy GG.*, 511 N.E.2d 75 (N.Y. 1987) (denying parental standing to unmarried boyfriend of mother on grounds he was "biological stranger").

137. The phrase "extraordinary circumstances" is taken from the New York Court of Appeals' decision in *Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976), in which the

what is in the best interest of that child in terms of custody and visitation rights of "non-parents."<sup>138</sup> The court swept aside as unimportant a constellation of facts that tends to characterize such cases: (1) the two women jointly planned to have the child; (2) frequently the co-parent performs the insemination of the birth parent; and (3) the two women promised to raise the child jointly and treat each other as equal parents in terms of responsibility for the child. In some cases the birth parent may (usually due to occupational constraints) actually spend less time with the child than the other parent, who consequently may form a closer parental bond as "primary caretaker." Perhaps most significantly, if the split-up occurs far enough in time past the birth of the child for the child to express an opinion, the child will usually consider both women to be her mothers and express a desire to maintain contact with both.

Because the court in *Alison D.* adopted a formalistically narrow construction of the term "parent," it rendered irrelevant for purposes of its decision the very factors that would normally be considered crucially important in making a custody decision between contending parents, the sum of which represents a judicial determination of the best interest of the child. As Judge Judith Kaye, dissenting in *Alison D.*, observed, by adopting this approach to standing under the Domestic Relations Law, the court had retreated from its "proper role" in a custody or visitation dispute: to determine the best interest of the child.<sup>139</sup> The court had failed to consider adequately whether, in order to be consistent with the overall policy goal of the domestic relations law, the factual constellation presented the sort of "extraordinary circumstance" that would justify departure from the general rule.

In light of the earlier *Braschi*<sup>140</sup> decision, the *Alison D.* court had in effect created a rather anomalous situation. If the relationship between the mothers terminated because the "non-biological" mother with whom they lived, a rent-controlled or stabilized tenant, had died, the birth mother would presumably be allowed to succeed to the leasehold as a "family member" of the deceased. On the other hand, if the relationship ended without the co-parent's death, the non-birth mother could not assert a legal claim, as

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court acknowledged that there might be extraordinary circumstances where it would be appropriate to consider a non-parent's claim to continued contact with a child.

138. *Alison D. v. Virginia M.*, 572 N.E.2d at 29.

139. *Alison D.*, 77 N.Y.2d at 658.

140. See *supra* note 77.

a "family member," in order to maintain personal contact with the child.

Other cases cited above are to similar effect with one additional factor. Unlike the couple in *Alison D.*, whose agreements and understandings about their relationship to their child were entirely oral, in some cases women contemplating such a family arrangement put their agreement in writing. However, courts consider the determination of custody and visitation issues to be a matter of public interest that is to be decided solely by reference to principles of family law, and have normally refused to give binding effect to private agreements, whether written or oral, that would seek to preempt the operation of established legal doctrines.<sup>141</sup>

## 2. Co-Parent Rights on the Death of a Parent

Courts have been willing to recognize the existence of a family unit consisting of a same-sex couple and a child in cases where the birth mother dies in an accident or from illness and a struggle ensues between the birth mother's family of birth and the surviving co-parent over custody of the child. In decisions from Florida<sup>142</sup> and Vermont,<sup>143</sup> trial courts acknowledged the parent-child relationship that existed between the surviving co-parent and the child, and determined that it was in the best interest of the child to remain with the co-parent. This result was particularly extraordinary

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141. For example, in *Sporleder v. Hermes*, 459 N.W.2d 602 (Wis. Ct. App. 1990), the court held that enforcement of a written agreement between contending lesbian co-parents that purported to govern physical custody of the child would be a violation of public policy, since a statute was the sole determinant of third-party custody or visitation rights, and the court considered a lesbian co-parent to be a "third party" if she was neither a birth mother nor an adoptive mother. To similar effect is *Georgia P. v. Kerry B.*, a 1994 decision of the California Court of Appeal, First District, unreported at the time of writing. See 1994 LESBIAN/GAY LAW NOTES 25 (March 1994).

142. In *re Pearlman*, 15 Fam. L. Rep. (BNA) 1355 (Fla. Cir. Ct., Broward Co., 1989). Judge Robert C. Scott awarded custody of a ten-year old child to Janine Ratcliffe, the surviving domestic partner of Joan Pearlman, the child's birth mother, over the objections of Pearlman's parents. See 1989 LESBIAN/GAY LAW NOTES 38-39. Upon Joan's death, her parents authorized Janine to continue caring for the child, but subsequently filed a petition to adopt the child and placed her with an aunt, cutting off further contact with Janine. The child objected to this arrangement. Janine filed suit to have adoption quashed and to obtain custody of the child. *Id.*

143. In *re Hamilton* (Vt. Probate Ct., June 30, 1989) (not published). Judge L. John Cain ruled that Susan Bellemare, the domestic partner of Susan Hamilton, who had died in an auto accident, should have temporary custody of Hamilton's infant son pending probate of Hamilton's will, in which Hamilton had indicated that she desired Bellemare to have custody of the child. Hamilton's parents argued that they or Hamilton's sister should be appointed legal guardians of the child. On July 25, 1989, Judge Cain upheld validity of the will and made Bellemare's appointment permanent. See 1989 LESBIAN/GAY LAW NOTES 46.

in *In re Pearlman*, the Florida case, where the court's decision included quashing an adoption decree that had already been granted to the deceased mother's parents, and ignoring the public policy embodied in Florida's statutory prohibition on adoption of children by homosexuals.<sup>144</sup> The decision was possible because, in the absence of a "natural parent," a court has wide discretion to make a custody determination in the best interest of a child. In this case, where the mother died after a prolonged struggle with cancer, there was a strong factual showing that the child preferred to live with Janine Ratcliffe, her mother's surviving partner. This arrangement was in the child's best interest, at least partly because the grandparents were elderly and ill. The court held that Ratcliffe's sexuality was not an impediment to the guardianship, without mentioning that allowing the partner to adopt would be contrary to Florida law.

Responding to the AIDS-related phenomenon of a growing number of unmarried mothers with AIDS desiring to make appropriate advance arrangements for the post-mortem custody and raising of their children, New York recently enacted a Standby Guardianship statute, generally available to custodial parents facing incapacity or death who desire to formalize their preferences with respect to custody of their children when they are no longer able to care for them.<sup>145</sup> Had such a statute been available in Florida, Joan Pearlman could have designated Janine Ratcliffe as standby guardian and several years of litigation could have been avoided.

### 3. Co-Parent Rights as Against a Known Sperm Donor

A New York trial court recently recognized a family unit of a same-sex lesbian couple with two children, one born by each of the women through donor insemination with a known donor, in *Thomas S. v. Robin Y.*<sup>146</sup> The recognition of the family unit came in the context of determination of a custody petition filed by one of the donors with respect to the child conceived from his sperm. The women had decided to obtain sperm from gay men as their donors, and had an unwritten agreement with each donor that he would

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144. FLA. STAT. CH. 63.042 (3) (1992).

145. N.Y. SURROGATE'S COURT PROCEDURE ACT § 1726 (McKinney 1993). A practice commentary by Margaret Valentine Turano, published in the 1994 pocket part, specifically references the plight of single mothers with AIDS as the main motivation for enacting the a law.

146. 599 N.Y.S.2d 377 (N.Y. Fam. Ct., N.Y. County, 1993), *appeal pending*, App. Div., 1st Dept. (argued Feb. 24, 1994).

not assert parental rights or take any parental role with respect to the children unless the mothers requested such contact. The mothers, who lived in New York, did contact the petitioner, who lived in San Francisco, when their daughter was three years old, and initiated contact and bicoastal visiting that extended over several years. However, the donor eventually wanted to expand his role to a greater extent than the mothers desired; when they refused, he filed a petition seeking a declaration of parental rights and a court-ordered visitation schedule, at which time the mothers cut off further contact.<sup>147</sup>

Family Court Judge Kaufmann denied the father's petition, embracing the theory of equitable estoppel,<sup>148</sup> apparently as a way of avoiding the problem created by *Alison D. v. Virginia M.*<sup>149</sup> Under that decision, the non-birth mother of the child would be considered a "biological stranger" with no parental rights. Instead, Judge Kaufmann treated the women and their children as a family unit. Genetic testing showed that the donor was the biological father of the child, so normally a declaration of paternity would follow as a matter of course. But if Judge Kaufmann had granted the donor's petition, the possibility would exist that the donor could gain custody if the birth mother were to become incapacitated or die, and could totally exclude the non-birth mother from further contact with the child.

Judge Kaufmann used the equitable estoppel theory to block the necessity to make a "best interests" analysis as between biological parents.<sup>150</sup> Noting that under the original agreement between the donor and the mother, the donor waived all rights to assert paternity, and that the donor had made no attempt to assert parental rights until the child was over ten years old, Judge Kaufmann decided to view the case from the perspective of the child.<sup>151</sup> He found that the donor's attempt to establish paternity had caused the child "anxiety, nightmares, and psychological harm," and that the child "views this proceeding as a threat to her sense of family security. For her, a declaration of paternity would be a statement

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147. *Id.* at 377-79.

148. "Equitable estoppel" is a legal principle in which the action or inaction of one party induces reliance by another to his or her detriment. *Thomas S.*, 599 N.Y.S.2d at 381.

149. 572 N.E.2d 27 (N.Y. 1991) (where a woman who had a live-in relationship with the child's mother was denied her habeas corpus petition, brought to obtain visitation rights after termination of the parties' relationship).

150. *Id.* at 382.

151. *Id.*

that her family is other than what she knows it to be and needs it to be.”<sup>152</sup> Given these findings, the judge concluded that ordering visitation was not in the child’s best interest, even if the judge had decided not to resort to estoppel and to declare the donor’s paternity. But it was the recognition of the cohesive family unit (and the unspoken recognition that the unit would be endangered, in light of *Alison D.*, by a paternity declaration) that undoubtedly sparked the judge’s decision to raise the estoppel against the donor.<sup>153</sup>

The *Thomas S.* decision marks a decided contrast with the many cases in which courts refuse to recognize the existence of a family unit when same-sex parents split up. Perhaps the key distinction is that the family at issue was intact and functioning, while in other cases, the unit had been ruptured and the continued involvement of the non-birth parent seemed likely to cause tension and instability in the child’s life. While it is true that such tension and instability may also be present when traditional opposite-sex marriages break up and the non-custodial parent continues to exercise visitation rights, visitation rights are almost always granted in those cases because of the well-established constitutional rights of a biological parent.<sup>154</sup> Since a co-parent is a “biological stranger,” the courts have no such constraints. This does not justify the results in the co-parent cases, but rather attempts to explain the seemingly inconsistent approach of the *Thomas S.* court in *sub silentio* taking into account the possibly disruptive effect in the future on this same-sex family unit if the donor’s paternity were to be declared.

#### 4. Co-Parent Rights Acquired Through Adoption

Perhaps the most dramatic example of recognition of a same-sex family comes when a court participates by adoption in creating such a family through the establishment of ties of legal parental status between a child and two parents of the same-sex. The Vermont<sup>155</sup> and Massachusetts<sup>156</sup> Supreme Courts took this step in historic decisions in 1993. In each of these cases, a lesbian couple

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152. *Id.*

153. There was also an unspoken recognition that, in light of *Alison D.*, the family unit would be endangered by a declaration of paternity.

154. See *Stanley v. Illinois*, 405 U.S. 645 (1972), where the Supreme Court recognized the parental rights of an unwed father as superior to a state policy that gave no weight to the unwed father’s biological tie in determining custody of children whose mother had died.

155. *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

156. *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *Adoption of Susan*, 619 N.E.2d 323 (Mass. 1993).

desiring to raise children planned the birth of a child through donor insemination of one member of the couple. After the child was born, the couple sought to create a legally-recognized family unit by establishing an adoptive relationship between the non-birth mother and the child. The couple did not wish to sever the parental relationship between the birth mother and the child, but rather to effectively establish that the child had two legal mothers.<sup>157</sup>

In the Vermont case, the Probate Court denied the non-birth mother's adoption petition, relying on a section of the adoption law that appears to require cutting off parental rights when an unrelated person, other than the parent's spouse (i.e., a step-parent), adopts a child.<sup>158</sup> On appeal, the state supreme court held that construing the cut-off provision to deny the petition would undermine the state's "primary concern" in the adoption law, which is "to promote the welfare of children."<sup>159</sup> In the opinion for the court, Justice Denise R. Johnson focused on the step-parent exception contained in the cut-off provision, asserting: "the legislature recognized that it would be against common sense to terminate the biological parent's rights when that parent will continue to raise and be responsible for the child, albeit in a family unit with a partner who is biologically unrelated to the child."<sup>160</sup> The lesbian co-parent petitioner was seen by the court as analogous to a step-parent, and the policy justification for letting a step-parent adopt without affecting the parental rights of the birth parent applied equally in this case: to secure for the child the benefits of being legally related to both parents who are raising the child.<sup>161</sup>

The realities of diverse family structures had outpaced the statutory law, and Justice Johnson recognized, on behalf of the court, the need to construe that law in a way that would provide reinforcement for the actual family unit that the same-sex couple had created:

It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive

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157. *Id.* Several trial courts around the country, mostly in unpublished decisions, had approved adoptions creating such same-sex families. See *Matter of Evan*, 583 N.Y.S.2d 997 (N.Y. Surr. Ct. 1992)) and *In re Adoption of Minor (T.)*, 60 U.S.L.W. 2191 (D.C. Super. Ct. 1991) (unpublished) and cases cited therein.

158. *Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d at 1272. See 15 VT. STAT. ANN. tit. 15, § 448 (1993). The provision contains an exception in the case of a step-parent seeking to adopt after marrying the birth parent.

159. *B.V.L.B.*, 628 A.2d at 1273.

160. *Id.* at 1274.

161. *Id.*

technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in these families, usually upon their dissolution . . . It is surely in the best interests of children, and the state, to facilitate adoptions in these circumstances so that legal rights and responsibilities may be determined now and any problems that arise later may be resolved within the recognized framework of domestic relations laws.<sup>162</sup>

In the Massachusetts cases, by contrast, the lesbian co-parents filed joint adoption petitions rather than having the non-birth mother file a single adoption petition.<sup>163</sup> In *Adoption of Tammy*, the Middlesex County Probate Court found that the adoption would be in the child's best interest and approved it, but simultaneously reported the case to the Court of Appeals to "secure [the] decree from any attack in the future on jurisdictional grounds."<sup>164</sup> In *Adoption of Susan*, the Suffolk County Probate Court reserved judgment and applied to the court of appeals for a ruling on whether the court had jurisdiction to grant the petition.<sup>165</sup> The Supreme Judicial Court approved the adoption in *Tammy* and remanded the petition in *Susan* for appropriate further fact-finding, since the Suffolk County Probate Court had not held an evidentiary hearing to determine whether the adoption would be in Susan's best interest.<sup>166</sup>

The Massachusetts adoption statute provides that a "person of full age" may petition to adopt "as his child another person younger than himself, unless such other person is his or her wife or husband, or brother, sister, uncle or aunt, of the whole or half blood."<sup>167</sup> In his opinion, Justice John M. Greany noted that another Massachusetts statute, setting forth rules of statutory interpretation, provides that "[w]ords importing the singular number may extend and be applied to several persons" unless the result would be either "inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute."<sup>168</sup>

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162. *Id.* at 1276.

163. *Adoption of Tammy*, 619 N.E.2d at 315; *Adoption of Susan*, 619 N.E.2d at 323.

164. 619 N.E.2d at 316.

165. 619 N.E.2d at 323.

166. *Tammy*, 619 N.E.2d at 321; *Susan*, 619 N.E.2d at 324.

167. MASS. GEN. L., ch. 210, § 1 (1981 & Supp. 1994). There is no express provision for joint adoptions, although the law requires that if the petitioner is married, the petitioner's spouse, if competent to adopt, must join the petition. 619 N.E.2d at 318.

168. *Id.* at 319 (citing MASS. GEN. L. ch. 4, § 6 (1981 & Supp. 1994)).



Greany found that neither objection would arise in this case, particularly because the legislature had specified in the adoption statute which combinations of adoptive parties would be expressly forbidden.<sup>169</sup> More importantly, allowing the adoption would only benefit the child, for a variety of reasons specified by the court:

[I]t will . . . serve to provide her with a significant legal relationship which may be important in her future. At the most practical level, adoption will entitle Tammy to inherit from Helen's family trusts and from Helen and her family under the law of intestate succession, to receive support from Helen who will be legally obliged to provide such support, to be eligible for coverage under Helen's health insurance policies and to be eligible for social security benefits in the event of Helen's disability or death.

Of equal, if not greater significance, adoption will enable Tammy to preserve her unique filial ties to Helen in the event that Helen and Susan separate or Susan predeceases Helen. . . . In some cases, children have been denied the affection of a functional parent who has been with them since birth, even when it is apparent that this outcome is contrary to the children's best interests. Adoption serves to establish legal rights and arise in the future, issues of custody and visitation may be promptly resolved by reference to the best interests of the child within the recognized framework of the law.<sup>170</sup>

Thus, the Massachusetts court joined the Vermont court in deciding that the adoption statute should be interpreted in a way that accommodated the reality of family diversity as presented in the petition. Since the child would be living with these two parents in any event, it made sense to bolster the child's security and welfare by creating legal ties of the parent-child relationship for the non-birth mother. The Massachusetts and Vermont high court cases provide an extremely persuasive precedent for the approval of such adoption petitions in other jurisdictions.<sup>171</sup>

## F. Failures

To avoid painting a false picture of unalloyed success in persuading the courts to recognize lesbian and gay families it is worth not-

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169. *Id.*

170. *Id.* at 320-21 (citations omitted).

171. However, these opinions were not persuasive enough for the Wisconsin Supreme Court, which denied a lesbian co-parent adoption petition based on a strict construction of that state's adoption statute. In the Interest of Angel Lace M., 516 N.W.2d 678 (Wis. 1994).

ing a few significant failures. There have been several instances in which someone attempted to use a statutory or common law principle that normally applies only to legally recognized families and was rebuffed by the court, even though policies underlying the statutory or common law principle might be argued to apply to the reality of the lesbian or gay family involved.

One notable example is *De Santo v. Barnsley*,<sup>172</sup> in which the Pennsylvania Superior Court rejected an attempt by a gay man to divorce his same-sex partner. John De Santo and William Barnsley held a ceremony on June 14, 1970, before a gathering of their friends, where they purported to marry each other.<sup>173</sup> They exchanged anniversary cards on June 14 in subsequent years, and lived together until November 15, 1980. Upon the breakup of their partnership, they apparently had serious disagreements about how to disentangle their finances and assets. As a result De Santo filed a complaint in state court seeking a divorce, equitable distribution of assets, and alimony. Conceding that he and Barnsley had not contracted a statutory marriage, De Santo claimed that their ceremony and subsequent cohabitation amounted to a common law marriage and made the divorce laws applicable to them to resolve the present controversy.<sup>174</sup>

While it might seem unusual to propose that legal divorce is a benefit of legal marriage, this case illustrates how that may be so. Lesbians and gay men who form family units may generate intricately entangled finances. One member of the couple may forego career opportunities to support the other. Same sex couples may include one partner who supported the other during professional education, or who abandoned a career to work in a business started by the other. In the absence of a binding partnership agreement the economic relationship can be quite complicated on dissolution and the availability of a neutral party with binding legal powers to divide the assets and, in an appropriate case, awarding alimony may be quite useful.

In *De Santo*, however, the court assumed without discussion that unless the court first found the two men to be married, the divorce law could not confer jurisdiction to resolve the controversy between De Santo and Barnsley.<sup>175</sup> Consequently, the court focused virtually its entire opinion on the question whether same-sex

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172. 476 A.2d 952 (Pa. Super. 1984).

173. *Id.* at 952.

174. *Id.* at 952, 956.

175. *Id.* at 956.

couples could contract a common law marriage, and ultimately adopted the same line of reasoning as some of the same-sex marriage opinions: the union of two men or two women is not marriage as the term is defined.<sup>176</sup> Thus, the implicit holding was that because the men were never "married," they could not be "divorced." But the court never really explained why it could not use its equitable powers to make a fair property division between these men.<sup>177</sup>

In *Matter of Cooper*,<sup>178</sup> Ernest Chin, a gay man whose lover died in 1988 after they had lived together for four years, tried to assert a claim for "spousal election" against the estate. However, William Cooper did not die intestate.<sup>179</sup> His will designated Chin as the residuary legatee, but made a specific bequest of real property to Cooper's prior lover.<sup>180</sup> Chin claimed that the property bequest came to about 80% of the assets in the estate, and asserted that he should be entitled to a full share of a spouse as provided in New York's Estate Powers and Trusts Law.<sup>181</sup> The Kings County Surrogate's Court ruled that only a marital spouse can exercise the right of spousal election, and rejected Chin's claim that excluding him from this right was unconstitutional.<sup>182</sup>

The Appellate Division sided with the surrogate, citing *Baker v. Nelson*<sup>183</sup> for the proposition that the gender-neutral language in New York's Domestic Relations Law did not compel or allow the court to treat the relationship between Chin and Cooper as a marriage for this purpose.<sup>184</sup> Chin had argued that the recent Court of Appeals decision in *Braschi v. Stahl Assoc. Co.*<sup>185</sup> showed a willing-

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176. The court refused to deal with the argument that failure to recognize a common law marriage for a same sex couple violated the state's constitutional ban on sex discrimination, on the ground that De Santo had not made this argument in the trial court. 476 A.2d at 956. It is interesting to query how the Hawaii Supreme Court would have reacted to such an argument were common law marriage recognized in Hawaii.

177. Ironically, the court devoted a paragraph of its opinion to a prior case, *Knauer v. Knauer*, 470 A.2d 553 (Pa. Super. 1983), holding that Pennsylvania would recognize a "palimony" cause of action which is an award that arises out of non-marital relationships. However, without any discussion, the court failed to extend the logic of the palimony precedents to this case where it confronted an allegation of an actual commitment ceremony before witnesses. *De Santo*, 476 A.2d at 955.

178. 592 N.Y.S.2d 797 (App. Div. 1993).

179. *Id.* at 797.

180. *Id.*

181. N.Y. EST. POWERS & TRUSTS § 5-1.1 (McKinney 1982 & Supp. 1994).

182. *In re Estate of Cooper*, 564 N.Y.S.2d 684 (Surr. Ct. 1990).

183. *See supra* note 13.

184. *Matter of Cooper*, 592 N.Y.S.2d at 798-99.

185. *See supra* note 77.

ness by the courts to adopt functional definitions of family law terms in order to effectuate the broad purpose of a statute.<sup>186</sup> In *Braschi*, that meant that the goal of preventing eviction of family members when a tenant dies would be served by recognizing a surviving gay partner as a family member.<sup>187</sup> In *Cooper*, Chin had argued, the goal of the spousal election provision would be served by recognizing that he and Cooper had been functional spouses.<sup>188</sup> The Appellate Division had a ready counter to this argument: the Court of Appeals' more recent decision in *Allison D. v. Virginia M.*,<sup>189</sup> where the court had refused to stretch the statutory definition of parent to a same-sex co-parent in order to confer jurisdiction in a custody or visitation dispute.<sup>190</sup> The Appellate Division also rejected Chin's constitutional arguments, asserting that a statutory classification that discriminated against gay people should be tested by the least demanding standard—the rational basis test—and that the State's interest in fostering marriage as an institution for conceiving and raising children justified excluding same-sex couples from marriage.<sup>191</sup>

Finally, there is the case of *Coon v. Joseph*,<sup>192</sup> where the court held that a gay man who witnessed a city bus driver verbally and physically assault the man's "life partner" could not state a cause of action for negligent infliction of emotional distress because the two men did not have the "close relationship" required for this tort.<sup>193</sup> The *Coon* court held that the tort could be asserted when the "plaintiff and the victim were closely related, as contrasted with the absence of any relationship or the presence of only a distant relationship."<sup>194</sup> In prior cases the California courts found that a close enough relationship existed when the plaintiff and victim were parent and child (or foster child), husband and wife, or common law

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186. 564 N.Y.S.2d at 687.

187. See *supra* note 77.

188. 564 N.Y.S.2d at 687.

189. See *supra* note 134.

190. 592 N.Y.S.2d at 799.

191. *Id.* at 800.

192. 237 Cal. Rptr. 873 (Cal. Ct. App. 1987).

193. The California Supreme Court first recognized the tort of negligent infliction of emotional distress in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). In 1988 the California Supreme Court further refined its analysis in *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988), holding that the surviving member of an unmarried childless heterosexual couple could not state a cause of action in a case where the couple was involved in an automobile action due to the negligence of another driver, and the woman died.

194. *Coon*, 237 Cal. Rptr. at 875-76.

husband and wife.<sup>195</sup> On the other hand, those same courts found that the relationship was not close enough between unmarried heterosexual cohabitants, cousins, or between a mother and daughter and a minor child who had been treated as if he were a member of their family, although unrelated to them.<sup>196</sup>

Despite the plaintiff's allegation of an emotionally significant, stable and exclusive relationship with the victim in this case, the court found that it was not "close" enough to satisfy the California test.<sup>197</sup> The plaintiff had particularly relied on *Ledger v. Tippitt*,<sup>198</sup> where the plaintiff and the victim lived together for two years, twice attempted to marry, the plaintiff was pregnant with the victim's child, and the victim bled to death in the plaintiff's arms. The court allowed the action for negligent infliction of emotional distress while denying a claim for loss of consortium, asserting that there is no "more fundamental family relationship than one which is created when two parents establish a home with their natural child."<sup>199</sup> But the *Coon* court found this case "inapposite," asserting that a same-sex couple could never qualify for recognition of a "de facto" marital relationship because "the Legislature has made a determination that a legal marriage is between a man and a woman."<sup>200</sup>

This reasoning drew a dissent from presiding Justice Clinton W. White, who argued that the court had ignored the reason why the California Supreme Court had adopted the "close relationship" requirement, which might be satisfied in a close homosexual relationship.<sup>201</sup> Noting that the courts had recognized the tort in cases

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195. *Id.* (citing *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), *Ochoa v. Superior Court*, 703 P.2d 1 (Cal. 1985) (parent-child); *Mobaldi v. Regents of University of California*, 127 Cal. Rptr 720 (Cal. Ct. App. 1976) (parent-foster child); *Krouse v. Graham*, 562 P.2d 1022 (Cal. 1977) (husband-wife); *Etienne v. DKM Enterprises, Inc.*, 186 Cal. Rptr. 321 (Cal. Ct. App. 1982) (by implication) (common-law husband-wife)).

196. *Id.* (citing *Drew v. Drake*, 168 Cal. Rptr. 65 (Cal. Ct. App. 1980) (unmarried cohabitants); *Trapp v. Schuyler Constr.*, 197 Cal. Rptr. 411 (Cal. Ct. App. 1983) (cousins); *Kately v. Wilkinson*, 195 Cal. Rptr. 902 (Cal. Ct. App. 1983) (unrelated minor child)).

197. 237 Cal. Rptr. at 877.

198. 210 Cal. Rptr. 814 (Cal. Ct. App. 1985).

199. *Id.* at 828 (quoting *MacGregor v. Unemployment Ins. Appeals Bd.*, 689 P.2d 453 (Cal. 1984)). In a case involving an engaged, cohabiting heterosexual couple, the New Jersey Supreme Court recently found that there was a sufficiently close relationship to sustain a tort action, despite the lack of a legal relation between the victim and the plaintiff. *Dunphy v. Gregor*, 642 A.2d 372 (N.J. Sup. Ct. 1994).

200. 237 Cal. Rptr. at 877-78.

201. *Id.* at 879 (White, J., dissenting).

where the plaintiff and the victim were not married, such as *Ledger v. Tippet*, Justice White insisted that

[w]hen marriage is not a requirement for recovery, there is no reason to distinguish between heterosexual relationships and homosexual relationships in determining whether the relationship is significant and stable . . . In a contemporary society (and particularly in San Francisco) it is foreseeable that a homosexual relationship might exist.<sup>202</sup>

In each of the three cases above, the courts refused to recognize a *de facto* spousal relationship, even though such recognition might have effectuated the underlying policies that the plaintiffs were trying to invoke in their lawsuits. In effect, the courts rejected the plaintiffs' attempt to make an "end run" around the lack of legal same-sex marriage by substituting the "functional family" concept for the marital status requirement contained in statutory or common law policy. These cases illustrate both the limitations of the piecemeal approach taken toward achieving particularistic recognition of same-sex families, as well as the timidity of some courts in shying from innovation, even in circumstances where their residual equitable powers might justify intervening to achieve justice between parties.

#### IV. Conclusion

The movement for lesbian and gay rights in the United States is a young movement, and in many parts of the country it is still mired in the first stage of Legalization.<sup>203</sup> More than twenty states still maintain laws penalizing much of the sexual activity in which lesbians and gay men might want to engage, as does the federal

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202. 237 Cal. Rptr. at 882-83. However, Justice White concluded that the assault on the victim in this case was not serious enough to qualify for the tort because there was no allegation that the victim was significantly injured by the defendant's action of punching him in the face, and so concurred with the majority's decision to dismiss the case. *Id.* at 833. In a separate concurring opinion, Justice Betty Barry-Deal commented that "it is the obligation of the Legislature to examine the question whether people in committed relationships, both heterosexual and homosexual, other than those meeting the legal requirements for marriage, should be accorded recognition giving rise to all, or selected legal rights traditionally reserved to married persons." *Id.* at 878.

203. Most of the significant lesbian and gay rights organizations now active were formed following the Stonewall riots although some earlier gay rights organizations date back to the early 1950s. For a historical treatment of the emergence of the lesbian and gay rights movement in the United States beginning after World War II see JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970* (1983).

government for members of the armed services and those present on federal property (such as federal parks).<sup>204</sup> In this light, it is remarkable that the third stage of liberation—the Normalization process that includes societal recognition for lesbian and gay families—has already had so many successes, including legislative enactments such as domestic partnership ordinances and judicial pronouncements such as *Braschi* and *Baehr*.

While the Normalization stage seems to provoke the fiercest backlash from those resistant to social change, as evidenced by the ballot initiative campaigns that began in the late 1980s and appear likely to accelerate over the next few years, it is perhaps the most crucial of the three stages for achieving what is truly the “gay agenda”: the ability of lesbians and gay men to participate as first class citizens without encountering any special barriers in their enjoyment of the “life, liberty, and the pursuit of happiness” that Thomas Jefferson proclaimed in the Declaration of Independence to be the birthright of every person in a free society.

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204. See NAN D. HUNTER, SHERRYL E. MICHAELSON AND THOMAS B. STODDARD, *THE RIGHTS OF LESBIANS AND GAY MEN* 118-25, 148-75 (3d ed. 1992) (Appendix, listing state laws).